IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1696

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, AND TENNECO INC., *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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FCR
STORY
CLAIMS: LITTON, NEWPORT NEWS SEEK SUPREME COURT

REVIEW ON FRAUD INDICTMENT, FRIGATE SETTLEMENT

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Two shipbuilders, unhappy with rulings by the U.S. Court of Appeals for the Fourth Circuit, are asking the Supreme ~~xxxx~~ Court to become involved in their claims battles with the Navy.

Newport News Shipbuilding and Dry Dock Co. ~~xxxxxx~~ seeks review of the appeals court's ruling (721 FCR A-19) that the Government isn't bound by the settlement negotiated by Gordon Rule requiring the Navy to pay an additional $22.7 million for construction of the DLGN-41 ~~xxxxxxxxxx~~ a nuclear-powered guided missile frigate. (Newport News Shipbuilding and Dry Dock Co, and Tenneco Inc. v. U.S., Sup. Ct. No. 77-1696, petition filed, 5/26/78)

Litton Systems ~~Inc.~~ wants the Court to consider ~~xx~~ the lower court's ~~xxxxxxxxxx~~ finding (729 FCR C-1) that the Government's implied threat to continue ~~xx~~ a fraud indictment, unless Litton agreed to reopen ~~ed~~ an ASBCA case in which it had won a $17 million judgement, doesn't require dismissal of the indictment. (Litton Systems, Inc. v. U.S., Sup. Ct. No. 771689, petition filed, 5/26/78)

In the Newport News case, the district court held that the parties had ~~xx~~ agreed to the settlement and that the Justice Department, having refused to participate in the negotiations, was estopped to deny it. The court of appeals, however, found no basis for invoking estoppel and said that the Attorney General had authority to disapprove the ~~xxxxxxxx~~ "proposed compromise."

The Fourth Circuit decision ~~is the first,~~ is the first one, Newport News states in its ~~xxx~~ petition, holding that an agency of the United States lacks the power, without

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approval of the Attorney General, to take action otherwise authorized by law, if that action has the effect of mooting pending litigation.

The Attorney General's authority is based on 28 U.S.C. Sections 516 and 519, which state that the "conduct of litigation" is reserved to the Justice Department and that the Attorney General is to "superivise all litigation" involving the Government. Executive Order 6166 authorizes the Attorney General to compromise litigation.

The Attorney General, ~~Newport News Continues states,~~ Newport News maintains, has no authority beyond that delegated to him. Since the Defense Department and the Navy have the authority to contract for ships, regardless of whether the United States and a shipbuilder are in litigation, exercise of that agency authority can't be vetoed by the Attorney General.

In S & E Contractors v. U.S., 406 U.S. 1 (426 FCR Sp Supp), the Court rejected the argument that the Attorney General was authorized, under 28 ~~xxxxx~~ ~~xxxxxxxxxxx~~ U.S.C. 516 and 519, to override the decisions of other executive officers. "'Where the responsibility for rendering a decision is vested in a coordinate branch of Government, the duty of the Department of Justice is to implement that decision and not to repudiate it,'" the Court stated.

The Litton Indictment

Litton, in its peitition, complains of an abuse of the Government's dual role as defendant in a contract action and as criminal prosecutor.

The court of appeals characterized the indictment threat as "plea bargaining" ~~and~~ similar to that ~~the situation~~ permitted in Bordenkircher v. Hayes, ~~98 Sup~~ 98 S.Ct. 663.

But, in plea bargaining, Litton argues, nothing is involved beyond the criminal process; and its fair and ~~ex~~ expeditious administration. The "extortionate discussions" between Litton and the Government prosecutors ~~about~~ regarding the ASBCA case had none of the characteristics of plea bargaining," as that term is used in Bordenkircher.

In a case such as the present one, in contrast to every case involving plea bargaining, the Government's role as a fair contractor, bound by contract law and the rules governing contract disputes, is a crucial factor, Litton states, and by vacating the trial court's "proper disciplining" of the Government for its extortion and vindictiveness, the appeals court "gave the green light for abuse in the future."

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UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners, Newport News Shipbuilding and Dry Dock Company ("Newport News") and Tenneco Inc., respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on February 27, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 571 F.2d 1283, is reproduced in its entirety as Addendum A hereto, pp. 1a-12a. The opinion of the United States District Court for the Eastern District of Virginia, which is not reported, is reproduced in its entirety as Addendum B hereto, pp. 13a-46a.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on February 27, 1978, and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether agency action, taken pursuant to duly delegated authority, can be set aside by the Attorney General solely because it would have the effect of compromising or rendering moot pending litigation in which the Attorney General represents such agency.

2. Whether a Court of Appeals can substitute its judgment as to a District Court's findings of fact, made on the basis of depositions, documentary evidence and concessions of counsel before the District Court, concerning the meaning and extent of compliance with an order of the District Court entered at the request of both parties.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions involved are reproduced in Addendum C hereto, pp. 47a-52a.

U.S. Constitution, Art. I, § 8, Cl. 13

10 U.S.C. § 131

10 U.S.C. § 133(a),(b),(d)

10 U.S.C. § 134

10 U.S.C. § 2303(a)(2),(b)(4)

10 U.S.C. § 2304(a)(13)-(14)

10 U.S.C. § 5011

10 U.S.C. § 5031

28 U.S.C. § 516

28 U.S.C. § 519

50 U.S.C. § 401

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Rule 52(a) of the Federal Rules of Civil Procedure is reproduced as Addendum D hereto, p. 53a.

STATEMENT

This action was brought by the United States in the United States District Court for the Eastern District of Virginia on August 29, 1975, under 28 U.S.C. § 1345, for specific performance of an alleged contract for the construction of a nuclear-powered guided missile frigate designated DLGN-41.[1] Work continued on the DLGN-41 pursuant to a court order consented to by the parties and requiring them to negotiate their differences in good faith. Nearly one year later the parties, through their duly authorized agents, arrived at what the negotiators on both sides believed to be an agreement settling the litigation. Upon Petitioners' motion the District Court enforced this settlement agreement, ruled that the United States had acted in bad faith, and dismissed the case. On appeal by the United States, the Court of Appeals for the Fourth Circuit reversed.

[1] The Navy has changed the designation DLGN to CGN and the terms "DLGN-41" and "CGN-41" have been used interchangeably in the pleadings, evidence and arguments before the courts below.

Petitioners now seek review by this Court of the action of the Court of Appeals.

Background—Pre-August 29, 1975

On December 21, 1971, Newport News entered into a contract (Contract Modification P00007) with the United States Navy for the construction of three nuclear-powered guided missile frigates designated as DLGN's 38, 39, and 40. [App. 5; App. Ex. 1-27].[2] The contract included a provision captioned "Option for Increased Quantity" [App. Ex. 27] which stated in part that the Navy had an option, exercisable before February 1, 1973, for the construction of an additional such frigate, the DLGN-41.

On February 1, 1973, the parties executed a document, Contract Modification P00018, which purported to extend the "Option for Increased Quantity" on new terms to February 1, 1975, but only if certain prior conditions were met. [App. Ex. 28-40]. One such condition was that the parties "negotiate in good faith to reach an agreement as rapidly as possible" on various matters, eight of which were specifically enumerated in the modification and upon which the parties had previously been unable to agree. [App. Ex. 31-32]. Almost a year passed in which the Navy made no effort to negotiate. [App. Ex. 233-35; *also see* Affidavit of F. Hunter Creech, dated August 29, 1975, pp. 4-8 (Record 29-33)]. In 1974, Newport News made repeated, unsuccessful attempts to get the Navy to negotiate and agree on such matters. [App. Ex. 233-35; *also see* Affidavit of F. Hunter Creech, dated August 29, 1975, pp.

[2] References are to the Appendix, Appendix Exhibits and Record before the Court of Appeals.

4-8 (Record 29-33)]. Also, despite the fact that the Navy had made over 300 separate drawing design and specification changes for the three earlier ships then under construction and even though the option related to an "Increased Quantity", the Navy repeatedly refused to incorporate such changes into the drawings and specifications for the DLGN-41. [App. Ex. 234; *also see* Affidavit of F. Hunter Creech, dated August 29, 1975, pp. 3-9 (Record 28-34)]. Meanwhile Newport News undertook certain preliminary work on the DLGN-41.

Finally in August 1974, Newport News formally advised the Navy that for numerous reasons—including the Navy's refusal to fulfill its obligations to negotiate under Modification P00018—Newport News regarded the option to be a nullity, void and of no legal effect. [App. 142, 595; *also see* Affidavit of F. Hunter Creech, dated August 29, 1975, pp. 6-8 (Record 31-33)]. Nevertheless, the Navy purported to exercise the option by notice to Newport News on January 31, 1975. [App. Ex. 46-46a]. Newport News immediately notified the Navy that it considered the alleged option and its purported exercise to be void and unenforceable, but expressed its continuing interest in reaching a mutually acceptable arrangement for construction of the DLGN-41. [App. Ex. 47]. Upon discovering shortly thereafter that the Navy had previously determined (in October 1974) that the total cost of the DLGN-41 would exceed the appropriation then available therefor, Newport News advised Navy that it considered the purported exercise of the option invalid for the additional reason that it violated the Anti-Deficiency Acts. [App. Ex. 358-63].

In light of the Navy's insistence that Newport News proceed with construction, and Newport News' insistence that it had no obligation to do so, the parties entered into a January 31, 1975 Memorandum of Understanding which was subject to cancellation by either party at the end of 30 days and pursuant to which: (a) Newport News agreed to continue its work on the DLGN-41 for the time being; (b) the Navy agreed to pay for subsequent work as it had for past work; (c) the parties agreed not to institute any action in any administrative or judicial tribunal; and (d) the parties agreed "to negotiate in good faith to reach an agreement as rapidly as possible to modify those contract provisions requiring amendment or to take other appropriate action." [App. Ex. 49-50; App. 145, 598].

Notwithstanding its initial agreement to discuss all issues between the parties, the Navy refused in early 1975 to negotiate with respect to the validity of the option or on any matters other than the eight items enumerated in Modification P00018 without some showing of government fault or unless new consideration flowed to the government. [App. 121-22, 148-50, 300; App. Ex. 236-39, 358-67]. In June 1975, the Navy refused to make any further payments for work being done by Newport News under the Memorandum of Understanding. [App. 53, App. Ex. 238-39]. The Navy also refused to agree with a request previously made by Newport News that the Navy join it in asking for an opinion of the General Accounting Office with respect to the sufficiency of the available appropriation. [App. 46-48, 51-53, 58-60, 63-66; App. Ex. 52]. Since Newport News was prohibited by the terms of the Memorandum of Understanding from seeking such an opinion on its own, it exercised its right to terminate the Memorandum of Understanding effective August 27, 1975, and on that day filed a request with the General Accounting Office for an opinion on the anti-deficiency questions. [App. 52-53, 63]. Newport News also advised the Navy that "[p]ending a resolution of the questions as to the validity of the option and its exercise, all material procurement, shop fabrication and other preliminary work on the DLGN41 which has been continuing pursuant to the Memorandum of Understanding will be suspended and the DLGN41 construction effort will not begin." [*See* Affidavit #2 of Vincent F. Ewell, dated August 29, 1975, Appendix A, Exhibit M, p. 10 (Record 168)].

August 29, 1975—March 7, 1977

On August 29, 1975, the government brought this action for an injunction to compel Newport News to construct the DLGN-41, and the District Court heard argument on the government's Motion for Temporary Restraining Order. [App. 14-77].[3] After a hearing and recess, during which counsel for the parties engaged in extensive discussion, the parties by counsel entered into a stipulation which, at the request of counsel, was entered as an order of the District Court in lieu of a Temporary Restraining Order. [Addendum E hereto, pp. 54a-55a]. This order required Newport News to continue its efforts with respect to the DLGN-41, required the Navy to pay for those efforts in the same manner as under the Memorandum of Understanding, and required that the changes made in the plans and speci-

[3] The government was represented by Mr. Jeffrey Axelrad, United States Department of Justice, and by Mr. E. Grey Lewis, United States Department of Navy.

fications for DLGN's 38, 39 and 40 be incorporated into the plans and specifications for DLGN-41. Additionally, after reciting Newport News' contention as to the invalidity of the option and its exercise, the order provided:

> "The parties agree to negotiate in good faith to reach an agreement as rapidly as possible to modify those contract provisions requiring amendment or to take other appropriate action." [Addendum E hereto, p. 54a]

At the time this order was entered, counsel for the Department of Justice and the Navy assured the District Court that, "Mr. E. Grey Lewis [General Counsel of the Navy] on behalf of the Navy has agreed to undertake to ensure the Navy's obligation hereunder." [App. 70-71, 150]. In response to a question from the court, Mr. Lewis confirmed his and the Navy's assumption of this obligation. [App. 71].

The Navy did not carry out its obligations under the stipulation and order to negotiate in good faith with Newport News during the succeeding 11 months. The Navy failed to provide Newport News with information essential to meaningful negotiations, and also ordered Mr. Lewis, who was responsible for its obligations under the consent order, out of the settlement negotiations in October 1975. [App. 152, 155-58]. The Deputy Secretary of Defense subsequently determined that from the date of the court order until July 1976, the Navy did not negotiate in good faith on the DLGN-41 dispute. [App. Ex. 253]. A subsequent negotiator of the Navy, Mr. Gordon W. Rule, who was appointed in July 1976, also characterized the Navy as having had during such period a "complete adversary attitude,

complete lack of good faith, at all times a lack of good faith." [App. 345-49].

The Navy's failure to negotiate in good faith caused Newport News to file a motion in the District Court on July 13, 1976, requesting, among other things, that the government be ordered to comply with its obligations under the August 29, 1975 order. [App. 112-17]. The Deputy Secretary of Defense held a meeting in his office within hours after the Newport News motion was filed, as a result of which Gordon W. Rule was appointed to negotiate with Newport News concerning the DLGN-41 dispute. [App. 286-88, 294; App. Ex. 251, 256, 277]. Newport News was subsequently advised of Mr. Rule's appointment and repeatedly told by the Navy that he had complete authority to resolve this controversy. [App. 222-23, 240-41, 291-92, 295, 306-07, 358, 373-75]. Mr. Rule was appointed with the knowledge and concurrence of the Department of Justice, and Justice confirmed Newport News' understanding that Mr. Rule had authority "to resolve all issues between the parties." [App. Ex. 277; App. 639-39a, 658].

Following Mr. Rule's appointment, both he and the Department of Justice requested that Newport News withdraw its July 13, 1976 motion because of Mr. Rule's appointment as negotiator. [App. 224-25, 294-95, 639-39a]. Acting on government representations that Mr. Rule had been appointed with full authority to reach agreement with Newport News resolving all issues between the parties, Newport News requested that the District Court hold the July 13 motion in abeyance pending further advice from Newport News. [App. 225, 639a, 658].

Immediately following Mr. Rule's appointment, he and Newport News commenced negotiations in good

faith to reach an agreement resolving the issues in dispute between the parties. [App. 223-29, 291-300]. Considerable information and data were requested from, and provided by, Newport News. [*Id.*]. On August 19, 1976, Gordon W. Rule received a contracting officer's warrant granting him:

> "Unlimited authority with respect to negotiations with Newport News Shipbuilding and Dry Dock Company for construction of CGN 41 under Contract N00024-70-C-0252." [App. Ex. 276; App. 230, 301, 306-07, 361, 374-75].

On the morning of August 20, 1976, Mr. Rule and other representatives of the Navy met with representatives of Newport News and an agreement was reached as to all substantive matters in issue, which was subsequently upheld by the District Court. [App. 230-35, 248, 300-06, 312-13, 407, 409, 460-61; App. Ex. 482; Addendum B hereto, pp. 13a-46a]. With the concurrence of the Navy, Newport News issued a press release announcing the settlement. [App. 236-38].

After reaching agreement on August 20, 1976, the parties began work on a written document expressing the terms of their agreement. [App. 239, 241-44, 307, 313-14]. At the same time, persons within the Navy commenced efforts to disavow the agreement and to place purported restrictions on Mr. Rule's authority. [App. 236-41, 243-45, 309-14, 320-23, 358-66, 372-74, 447-51; App. Ex. 502, 528]. Notwithstanding these efforts, Mr. Rule, on behalf of the Navy, and Mr. Dart, on behalf of Newport News, executed a final written contract modification on October 7, 1976, constituting a written settlement agreement. Mr. Rule's contracting officer's warrant was immediately thereafter revoked.

[App. 197, 333-34, App. Ex. 279]. Deputy Secretary of Defense Clements then found the agreement to be a reasonable resolution to the dispute and sent the agreement to the Attorney General for implementation. [Addendum B hereto, pp. 27a, 35a]. The Attorney General subsequently, however, purported to disapprove the settlement and refused to recognize its validity. [Addendum B hereto, p. 27a].

Newport News thereupon filed a Motion for Entry of Judgment (on the ground that the case had been settled by the agreement with Mr. Rule) or, In the Alternative, for Dismissal with Prejudice (on the ground of bad faith on the part of the government in failing to carry out the District Court's order). [App. 192-248].

The Decisions Below

In a March 8, 1977 Memorandum Opinion and Order, the District Court held that the parties had reached an agreement on August 20, 1976, the government was bound by its agreement, and the government had acted in bad faith. Accordingly, the District Court granted Newport News' motion and dismissed the case. [Addendum B hereto, p. 46a].

The District Court supported its decision by making extensive findings of fact based on a voluminous record, containing testimony, affidavits and documentary evidence, and the appearance and concessions of counsel before it. The court found that: Deputy Secretary Clements appointed Mr. Rule as chief negotiator with authority to bind the United States to a compromise agreement, and, on August 19, 1976, the Navy had issued Mr. Rule a contracting officer's warrant granting him "unlimited authority" to negotiate with Newport News concerning the dispute; serious negotiations

had begun July 15, 1976, and continued on an almost daily basis through August 20, 1976; on August 20, 1976, the parties came to an oral agreement on all of the outstanding substantive issues concerning the CGN-41 and agreed to prepare a written agreement; and that the parties intended to be bound by their August 20, 1976, agreement. [Addendum B hereto, p. 23a-25a]. On the basis of these findings, the District Court concluded that a binding agreement between the parties existed on August 20, 1976.

The District Court made additional findings of fact concerning the conduct of the government and the Department of Justice in the settlement negotiations. It found that the government had agreed on three separate occasions to negotiate in good faith to resolve all its differences with Newport News: when it entered into the January 31, 1975 Memorandum of Understanding; when it sought entry of the August 29, 1975 consent order; and when Mr. Rule was appointed and Newport News was induced to request the District Court to stay action on Newport News' July 13, 1976 motion. [Addendum B hereto, pp. 19a; 14a, 21-22a, 39a; 23a-24a, 39a]. The court found that in August 1975, the Department of Justice had represented to it that the United States was bound to negotiate in good faith and had joined with Newport News and requested the court to enter its August 29, 1975 consent order. [Addendum B hereto, pp. 21a-22a, 39a]. At that time the Department of Justice stipulated to the court that the Navy's General Counsel would "undertake to ensure the Navy's obligation" to negotiate pursuant to the consent order. [Addendum B hereto, pp. 22a, 39a]. The court further found that, the United States through the Department of Justice had made "a deliberate decision not to seek an immediate judicial de-

termination of its rights under the disputed option contract" when it requested entry of the August 29, 1975, consent order. [Addendum B hereto, p. 39a]. The Department of Justice was found to have reaffirmed its agreement when it consented to the appointment of Mr. Rule. [Addendum B hereto, p. 40a]. The Department of Justice refused to participate directly in any negotiations for the next seventeen months. [Addendum B hereto, p. 15a]. On the basis of these findings the court held the United States "estopped to deny the authority of the Department of Defense to bind the United States to a compromise agreement." [*Id.*].

Notwithstanding the government's commitment to negotiate the resolution of all differences in good faith, the District Court found that the government "utterly failed" to so negotiate until Mr. Rule's appointment. [Addendum B hereto, p. 14a]. It found that: the Navy had ignored not only its own January 31, 1975 Memorandum of Understanding, but the August 29, 1975 consent order as well [Addendum B hereto, p. 22a]; it had ordered the General Counsel of the Navy to stop negotiating in October of 1975 [Addendum B hereto, pp. 22a-23a]; and the Navy made efforts to undermine Mr. Rule's authority after August 20, 1976. [Addendum B hereto, pp. 25a-27a]. The court further found that Navy's position that it would only negotiate the eight items originally listed in Modification P00018 was "incredible" since language expressly limiting the negotiations to those items was expressly excluded from the final version of the January 31, 1975 Memorandum of Understanding. [Addendum B hereto, p. 20a]. The court stated that it would not have entered the August 29, 1975 consent order had it been aware

that the government would later attempt to assert that it was not required to negotiate all differences. [Addendum B hereto, p. 14a].

On the basis of these findings of fact, as well as others recited in its opinion, the District Court held the parties had agreed to a settlement, the government and the Department of Justice were estopped to deny it, and the government had acted in bad faith towards the court and Newport News.

The government appealed the District Court's decision to the United States Court of Appeals for the Fourth Circuit which reversed the lower court in a February 27, 1978 decision and remanded the case to the District Court for further proceedings consistent with the court's opinion. [Addendum A hereto, p. 10a]. The Court of Appeals set aside the District Court's findings of an August 20, 1976 agreement notwithstanding its concurrence in the trial court's finding that on that date "the parties reached what Rule and the Shipyard's negotiators considered to be an oral agreement in principle . . . ." [Addendum A hereto, p. 3a]. Ignoring the specific findings of the District Court and without citing any principles of law involved, the Court of Appeals concluded that the Department of Justice decision not to take part in the settlement negotiations, standing alone, did not constitute "a sufficient basis for invoking estoppel." [Addendum A hereto, p. 8a]. Conceding that the underlying facts were not in dispute [Addendum A hereto, pp. 5a, 10a], and that there was no need for an evidentiary hearing on the motion to enforce the settlement [Addendum A hereto, p. 5a], the Court of Appeals nevertheless held that a summary disposition of the case on the grounds of bad faith by the government towards the court at that time was

inappropriate because there was a controversy as to the inferences that could be drawn from the undisputed underlying facts. [Addendum A hereto, p. 10a].

I. THE HOLDING OF THE COURT OF APPEALS, THAT A DEPARTMENT OR AGENCY OF THE UNITED STATES CAN TAKE NO ACTION RENDERING PENDING LITIGATION MOOT WITHOUT THE APPROVAL OF THE ATTORNEY GENERAL, CONTRAVENES LAW AND PUBLIC POLICY AND PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW REQUIRING RESOLUTION BY THIS COURT.

The decision of the Court of Appeals in this case marks the first time that any federal court has held that a department or agency of the United States lacks the power, without approval of the Attorney General, to take action otherwise authorized by law, if that action has the effect of mooting pending litigation.

The Department of Defense and the Navy have specific authority and responsibility for the procurement of vessels for the fleet. U.S. Const. Art. I, § 8, Cl. 13; 10 U.S.C. §§ 131, 133(a), (b), (d), 2303(a)(2), (b)(4), 2304(a)(13)-(14), 5011, and 5031; 50 U.S.C. § 401; *Lockheed Shipbuilding & Construction Co.,* 75-2 BCA ¶ 11,566 at 55,213-15, 17. That authority was exercised when Gordon W. Rule was appointed as a contracting officer pursuant to 32 C.F.R. § 1-405.2. On August 20, 1976, Mr. Rule, in his capacity as a duly designated contracting officer, and Newport News reached an agreement for the construction of the vessel known as the DLGN-41. On October 7, 1976, the parties entered into a contract modification which was approved by Deputy Secretary of Defense Clements as "a reasonble resolution to this complex matter." [App. Ex. 259]. On October 15, 1976, the modification was sent to the

Attorney General for implementation,[4] but the Attorney General subsequently purported to disapprove the agreement. [Addendum B hereto, p. 27a].

The Court of Appeals, without elaboration or citation to any authority which grants the Attorney General power to do more than supervise, compromise and settle litigation, held that: "The law pertaining to the Attorney General's control over cases referred to the Department of Justice by other agencies of the government fully sustains his authority to disapprove the proposed compromise." [Addendum A hereto, p. 9a]. However, contrary to this holding of the Court of Appeals, the law does not sustain any power in the Attorney General to veto any action of a department or agency of the United States which would have the effect of rendering litigation moot.

The Attorney General's authority to conduct litigation on behalf of federal agencies is not inherent, but rather derives from 28 U.S.C. §§ 516, 519. Neither of these sections limits the authority of an executive agency to take actions permitted it by law which would have the effect of mooting or compromising litigation which has been referred by the agency to the Department of Justice. 28 U.S.C. § 516 states only that the "conduct of litigation" to which the government is a party and the "securing of evidence therefor" are reserved to the Department of Justice. Similarly, 28 U.S.C. § 519 provides only that the Attorney General

[4] The court order of August 29, 1975, with respect to the obligations of the parties as to negotiations and as to construction and payment pending resolution of the dispute, was still in effect, and it was necessary for appropriate steps to be taken to obtain ratification by the District Court of the settlement negotiated pursuant to that order.

will "supervise all litigation" involving the government and "shall direct all United States Attorneys, Assistant United States Attorneys and special attorneys appointed under [28 U.S.C. § 543] in the discharge of their respective duties." Executive Order No. 6166, June 10, 1933, gives the Attorney General the authority to compromise litigation. No decision has been found that construes these statutory provisions, their predecessors, or Executive Order No. 6166 to extend the Attorney General's authority beyond: (1) the overseeing of the conduct of proceedings on behalf of the United States; (2) the authorizing of Department of Justice attorneys to appear as counsel of record on behalf of the United States; and (3) the ability to compromise litigation committed to his supervision.

In short, the Attorney General has no authority beyond that which is delegated to him. Inasmuch as the Department of Defense and the Navy have the authority to contract for vessels irrespective of whether the United States and a shipbuilder are in litigation, the exercise of that authority cannot be prevented or vetoed by the Attorney General. If the Attorney General is for the first time to acquire authority to block agency actions, within the scope of the agency's authority, which have the effect of settling or mooting litigation, Petitioners contend that only the Congress can grant it. At the very least, the decision of the Court of Appeals holding that existing law grants or sustains such authority requires the review of this Court.

A. The Decision Below Conflicts With Decisions of This Court.

This Court has specifically upheld the power of an agency to take action, within the scope of its authority,

which has the effect of mooting pending litigation. *United States* v. *Morris,* 23 U.S. (10 Wheat) 246 (1825).

In *Morris,* this Court upheld the authority of the Secretary of the Treasury to remit a forfeiture during pending litigation. The plaintiffs, customs collectors suing in the name of their employer, the United States, and represented by the Attorney General, brought suit against a United States Marshal for his failure to sell a vessel and its goods which had been seized and condemned as forfeited for violation of non-intercourse acts then in existence. After condemnation, but before execution, and therefore while the matter was still in litigation, the Secretary of the Treasury remitted the forfeiture. The marshal then delivered the property back to the defendants in the condemnation action pursuant to the Secretary's grant of remission. This Court held over objection of the plaintiffs that the Secretary did not exceed his authority when he remitted the forfeiture during the pendency of litigation involving validity of the forfeiture. The *Morris* decision was cited with approval and discussed at some length by the Court in *The Confiscation Cases,* 74 U.S. (7 Wall.) 454, 461-62 (1869).

Moreover, in *S & E Contractors* v. *United States,* 406 U.S. 1 (1972), this Court rejected the government argument that 28 U.S.C. §§ 516, 519 gave the Attorney General authority to override the decisions of other executive officers:

> "[W]here the responsibility for rendering a decision is vested in a coordinate branch of Government, the duty of the Department of Justice is to implement that decision and not repudiate it." *Id.* at 13.[5]

The conflict between the holding of the court below and the decisions of this Court in *Morris* and *S & E Contractors* fully justifies the grant of certiorari to review the judgment below.

B. The Decision Below Conflicts With a Decision of the United States Court of Appeals for the First Circuit.

The Court of Appeals for the First Circuit has taken a position directly in conflict with the holding of the court below. In *Leonard* v. *United States Postal Service,* 489 F.2d 814 (1st Cir., 1974), while the litigation was pending, the Postal Service entered into a stipulation of settlement. Despite objections of the Attorney General, the District Court entered judgment. The Court of Appeals found that, under the special statutory scheme for the Postal Service, that agency was authorized to settle litigation. The Court further stated (at 817 n.7), however:

> "These [cited] cases may establish the proposition that where the Attorney General has supervision and control over a particular litigation he is empowered to settle that litigation. But we have had no case pointed out to us, nor have we been able to discover any, where it has been held that the Attorney General can *block* a settlement agreed to

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[5] An agency cannot, of course, take action which would render pending litigation moot if it lacks the authority to take such action in the absence of litigation. *The Grey Jacket,* 72 U.S. (5 Wall.) 342 (1867). It has been recognized, however, that this does not mean that an agency is completely lacking in authority to compromise a matter merely because it is in litigation. *United States* v. *Sandstrom,* 22 F. Supp. 190, 191 (N.D. Okla., 1938).

> by a government agency involved in that litigation. Such an action on the part of the Attorney General would not further the policy interest in giving him power to screen out cases which should not burden the federal courts. *See,* FTC v. Claire Furnace Co., *supra.* And, at least in some circumstances, it would violate the spirit of S & E Contractors, Inc. v. United States, 406 U.S. 1, 13, 92 S. Ct. 1411, 31 L.Ed. 2d 658 (1972)."
> (emphasis in original)

The position of the Court of Appeals below and that of the First Circuit as to the authority of the Attorney General to set aside compromises of litigation are in direct conflict, and this conflict alone justifies the grant of certiorari to review the judgment below.

C. The Decision Below Contravenes the Public Policy in Favor of Compromise of Litigation and Threatens the Efficiency of the Executive and Judicial Branches of the Federal Government.

The decision of the Fourth Circuit in this case, which affects every party to litigation in which the Attorney General is involved, contravenes a longstanding public policy in favor of compromises of litigation. *Williams* v. *First National Bank,* 216 U.S. 582, 595 (1910). Such compromises permit a more efficient functioning of the judicial system. At a time when the number of cases pending in the federal courts is increasingly annually, impediments to compromises should not be condoned, much less approved. Such impediments are also inappropriate from the perspective of the departments and agencies of the United States whose own orderly functioning depends in part on their ability to decide whether to continue or compromise disputes with private parties.

II. THE DECISION OF THE COURT OF APPEALS IS BASED ON A STANDARD OF REVIEW INCONSISTENT WITH THE DECISIONS OF THIS COURT AND THE FEDERAL RULES OF CIVIL PROCEDURE.

The Court of Appeals improperly discharged its appellate function when it failed to apply the proper standard of review to the District Court's findings of fact and substituted its judgment for that of the lower court. Both the Federal Rules of Civil Procedure and decisions of this Court accord finality to trial court findings of fact unless the findings are clearly erroneous. Rule 52(a), Fed. R. Civ. P.; *United States* v. *United States Gypsum Co.,* 333 U.S. 364, reh. den., 333 U.S. 869 (1948). Rule 52(a) does not authorize the reviewing court to try factual issues *de novo* and requires that deference be given to the decisions of the trier of fact. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 123 (1969).

The duty of a reviewing court is to correct clear error and to set aside the trial court's findings of fact only when a review of the evidence clearly compels a contrary finding. *United States* v. *Yellow Cab Co.,* 338 U.S. 338, 342 (1949); *United States* v. *Singer Mfg. Co.,* 374 U.S. 174, 194 n.9 (1963). A choice by the trial court between permissible views of the evidence is not "clearly erroneous". *United States* v. *Yellow Cab Co., supra,* at 342. A reviewing court is not given the choice of substituting its judgment for that of the trial court simply because it might give the facts another construction or resolve ambiguities differently. *United States* v. *National Ass'n. of Real Estate Boards,* 339 U.S. 485, 495-96 (1950). Instead, Rule 52(a) requires it to accept the lower court's findings unless clearly erroneous, and this is true even though the record is

lengthy, contains conflicts in testimony, and includes quantities of documentary material. *United States* v. *Oregon State Medical Society,* 343 U.S. 326 (1952). The Rule applies as well to factual inferences drawn from undisputed facts. *Commissioner* v. *Duberstein,* 363 U.S. 278, 291 (1960).

The opinion of the Court of Appeals, which is devoid of any reference to Rule 52(a) or any holding that the District Court's findings of fact were clearly erroneous, constitutes precisely the *de novo* retrial of factual issues and substitution of judgment which Rule 52(a) and the decisions of this Court prohibit. *Zenith Radio Corp.* v. *Hazeltine Research, Inc., supra;* and *United States* v. *National Ass'n. of Real Estate Boards, supra.* A reading of the Court of Appeals opinion, which fails to consider some of the District Court's findings and concedes that others are not in dispute, compels the conclusion that the Court of Appeals did not regard the trial court's findings as clearly erroneous within the meaning of Rule 52(a). Instead, the Court of Appeals simply had a different view of the evidence as to the existence of an agreement on August 20, 1976, the actions of the government constituting estoppel to deny a settlement, and the bad faith conduct of the government. Such a difference of opinion is not sufficient grounds for a reviewing court to set aside a trial court's findings where, as in this case, the findings were made on the basis of a voluminous record, containing testimony, affidavits, and documentary evidence, *United States* v. *Oregon State Medical Society, supra,* and also the appearance and concessions of counsel before the District Court.

The August 20, 1976 Agreement

The District Court found that Mr. Rule had unlimited authority to negotiate a compromise and that settlement discussions commenced on July 15, 1976. [Addendum B hereto, pp. 24a-25a]. These discussions continued for over a month and culminated on August 20, 1976 in an agreement on all substantive matters in issue. [Addendum B hereto, p. 25a]. The District Court found that the parties intended to be bound on that date [Addendum B hereto, p. 25a], and the Court of Appeals acknowledged that the Navy's duly authorized representative, Mr. Rule, and Newport News reached what they considered to be an agreement. [Addendum A hereto, p. 3a]. However, in direct contradiction to its acknowledgement, the Court of Appeals disagreed with the trial court and found that the parties did not intend to be bound by their August 20, 1976 agreement. [Addendum A hereto, p. 6a]. Whatever the reason for this inconsistency in its opinion, the contradiction demonstrates that the Court of Appeals did not, as indeed on this record it could not, find that the evidence *clearly* compels a contrary finding. The District Court's view of the evidence was clearly permissible, and the Court of Appeals' rejection of the trial court's findings constitutes a substitution of judgment which is prohibited by Rule 52(a) and the decisions of this Court construing the Rule. *See, e.g., United States* v. *National Ass'n. of Real Estate Boards, supra.*

Department of Justice Conduct

The District Court held that the Department of Justice was estopped from disapproving the settlement. [Addendum B hereto, pp. 15a, 40a]. Its holding was based on extensive findings of fact that the Depart-

ment: (1) made a "deliberate decision" not to go forward with its injunction action, but instead voluntarily agreed and subjected itself, through the order of the District Court, to negotiate and to rely upon the Navy to conduct the negotiations rather than participate itself; (2) agreed to and promoted the August 29, 1975 court order and directed Navy officials to conduct negotiations on behalf of the United States and "to reach an agreement as rapidly as possible"; (3) refused to participate in negotiations despite its knowledge that the Navy was not negotiating pursuant to the court order and was in "utter default" prior to Mr. Rule's appointment; (4) reaffirmed its agreement when Gordon Rule was appointed and gave its express approval of settlement negotiations; and (5) had exercised its power to control the litigation by asking the court to enter its consent order, and having done so, could not repudiate its position. [Addendum B hereto, pp. 39a-41a]. The August 20, 1976 agreement was negotiated by Gordon Rule pursuant to a stipulation of the parties which had been entered as an order of the court at the specific request of the Department of Justice. [Addendum B hereto, pp. 21a-25a, 31a]. The opinion below neither discusses any of these findings, which were fully supported in the record, nor does it cite any portion of the record which either is to the contrary or suggests any limitation, exception or reservation in the government's actions which would have informed the District Court or Newport News prior to the August 20 agreement that the government did not intend to be bound by its actions. The Court of Appeals' conclusion that the government was not estopped, without citing either facts in support of that conclusion or any analysis of applicable law, is therefore precisely the substitution of judgment

which the "clearly erroneous" standard was adopted to prevent.

The Government's Bad Faith

The Court of Appeals also failed to comply with Rule 52(a) and the decisions of this Court when it held that summary disposition of the case on the basis of the government's bad faith was inappropriate. The District Court held that the government had acted in bad faith towards *the court,* as well as towards Newport News, and dismissed the litigation. The dismissal was supported by extensive findings of fact concerning the manner in which the government conducted itself on and after August 29, 1975, the date on which the government agreed to negotiate in good faith to resolve the dispute over construction of the DLGN-41 and specifically requested the District Court to enter an order requiring it to so negotiate. [Addendum B hereto, pp. 21a-23a, 25a-27a]. The Department of Justice represented to the District Court that the General Counsel of the Navy, E. Grey Lewis, would undertake to satisfy the government's obligations under the order, and Mr. Lewis advised the Court that he would do so. [Addendum B hereto, pp. 22a, 39a]. Notwithstanding these assurances, the District Court found that on October 29, 1975, Mr. Lewis was ordered by higher Navy officials to stop all negotiations, and that for the next eleven months

> ". . . the United States *totally* failed to meet its obligations to negotiate in good faith, although at the same time it was receiving the benefits of the Shipyard's continued performance under the disputed contract." [Addendum B hereto, p. 23a (emphasis in original)]

The District Court further found that during this period, the Department of Justice knew that the Navy was not negotiating and that prior to Mr. Rule's appointment "Navy officials were in utter default" under this order. [Addendum B hereto, p. 39a]. Both prior and subsequent to Mr. Rule's appointment and the August 20, 1976 agreement, the Navy attempted to undercut his authority and the agreement which resulted from its exercise. [Addendum B hereto, pp. 25a-27a].

Notwithstanding the foregoing findings of fact, among others, evidencing the bad faith of the government towards the District Court, the Court of Appeals held that "summary disposition" of the case was "inappropriate". [Addendum A hereto, p. 10a]. The Court of Appeals conceded that "the underlying facts were not in dispute," but held that the inferences to be drawn from them were in controversy as to the meaning of the clause "to take other appropriate action" which was contained in the stipulation and court order of August 29, 1975. [*Id.*] This Court has held that inferences drawn from undisputed facts can be set aside only if clearly erroneous. *Commissioner* v. *Duberstein, supra.* However, the Court of Appeals opinion notes only that a controversy existed as to those inferences, but nowhere states that the inferences drawn by the District Court were so clearly in error as to compel a reversal of the District Court's conclusion that the case should be dismissed because of the government's bad faith.

A fundamental defect in the Court of Appeals opinion is that the District Court judge was not only the trier of fact, but also a party to the order and had no doubt as to its intended scope. The District Court entered the order at the request of both parties "believing that all good faith attempts to reach a settlement should be encouraged." [Addendum B hereto, p. 21a]. The transcript of the hearing at which the order of August 29 was issued shows that the court was concerned with the total dispute between the parties, including the validity of the option and its exercise and not just the specific items enumerated in Modification P00018 as to which the government later claimed it was limited to negotiate. [App. 14, 34-38, 56]. Before the order was issued, the court inquired of Mr. David James, one of the government's counsel, about the scope of negotiations under the Memorandum of Understanding which contained the identical "take other appropriate action" language.

> "The Court: . . . does this memorandum of understanding contemplate the responsible people in a number more than one on each side sitting down and arbitrating the problems that apparently have beset you?
>
> Mr. James: Yes, Your Honor . . . ." [App. 30, 31].

Nowhere in the proceedings was there any suggestion that negotiations were to be limited to only *some* of the issues.[*] In its opinion dismissing the litigation for failure to comply with the August 29, 1975 order by negotiating all matters in dispute, the District Court stated:

> "Had we been aware that the Government would later attempt to assert that it was not required to so negotiate, this Court would never have entered

[*] After the order of August 29, 1975 was entered, Assistant Secretary of Navy Bowers directed "negotiations with Newport

> the stipulated agreement of the parties to negotiate as an order. We would have moved the parties along to a swift adjudication of the validity of the disputed contract." [Addendum B hereto, p. 14a]

In short, there was no dispute as to either the facts or the inferences to be drawn from them as to the obligations of the Government *to the District Court* to negotiate all items in dispute. To hold otherwise is to conclude that neither the District Court nor the parties knew what was meant by the stipulation and order, and that is a conclusion supported by neither logic nor the record in this case. Accordingly, the District Court's dismissal, which was within its discretion and supported by an uncontradicted factual record, should have been upheld.

The opinion of the Court of Appeals evidences application of a far less stringent standard of review than that required by Rule 52(a), and this Court, in the exercise of its supervisory responsibilities, should grant certiorari to rectify this error.

News in good faith on *all matters* contained in the stipulation set forth in the court order"—which stipulation recited Newport News' claim of invalidity of the option exercise [App. 75]—and further specifically directed that settlement be reached in such negotiations on the "CGN-41 Option validity." [App. 633 (emphasis added)]. It was later that Navy attempted to limit the scope of the negotiations to the eight items in P00018.

CONCLUSION

For these reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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May 1978

ADDENDUM

ADDENDUM A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1748

UNITED STATES OF AMERICA, *Appellant*,

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, AND TENNECO, INC., *Appellees*.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. John A. MacKenzie, District Judge.

Argued October 4, 1977 Decided February 27, 1978

Before HAYNSWORTH, *Chief Judge*, BUTZNER, *Circuit Judge*, and FIELD, *Senior Circuit Judge*.

Patricia N. Blair, Attorney, Civil Division, Department of Justice (Barbara Allen Babcock, Assistant Attorney General; William B. Cummings, United States Attorney; Leonard Schaitman & Stuart E. Schiffer, Attorneys, Civil Division, Department of Justice on brief) for appellant; K. Martin Worthy (John G. DeGooyer, Mark Sullivan, III, John H. Spellman, Jeffrey M. Petrash, Larry H. Mitchell, Hamel, Park, McCabe & Sanders; William McL. Ferguson, Ferguson & Mason on brief) for appellees.

BUTZNER, *Circuit Judge:*

The United States appeals from an order of the district court enforcing an oral settlement purportedly reached between the Department of the Navy and the Newport

News Shipbuilding and Drydock Co., and dismissing as moot the government's suit for specific performance of a contract for construction of a vessel. We vacate this order because we conclude that the parties' negotiators did not settle the case orally and because the Attorney General, whose approval was essential, rejected the terms that were ultimately reduced to writing.

I

This litigation arises from the Navy's attempt to exercise an option for construction of the DLGN-41, the fourth ship in a class of nuclear powered guided missile frigates. As part of an agreement to negotiate a number of disputed matters, the final date for exercising this option was extended to February 1, 1975. In the meantime, the Navy authorized the shipyard to start preconstruction work. In August 1974, however, the shipyard notified the Navy that for a variety of reasons it considered the option invalid. The Navy disagreed, and on January 31, 1975, it formally undertook to exercise the option. The parties then signed a memorandum of understanding obligating the shipyard to continue its preconstruction work while they negotiated. In August 1975, the shipyard exercised its right to cancel the memorandum of understanding because it was dissatisfied with the progress of the negotiations.

As a result of the cancellation, the Navy filed this suit seeking specific performance of the contract and a temporary restraining order directing the shipyard to resume work on the vessel. At a hearing on August 29, 1975, the district court adopted as its order a stipulation by the parties providing for continued work on the ship, for continued payment for work performed, and for negotiations "in good faith to reach an agreement as rapidly as possible to modify those contract provisions requiring amendment or to take other appropriate action."

The shipyard, again dissatisfied with the Navy's negotiating tactics, filed a motion on July 13, 1976, for enforcement of the court's order to negotiate in good faith. It also sought to have its obligation to continue work suspended until the Navy complied. The Navy countered by designating as its negotiator Gordon W. Rule, an experienced civilian official in the procurement office. In view of this development, the shipyard requested the court to reserve ruling on its motion.

Rule began negotiating with the shipyard on July 15, 1976, and subsequently the Navy issued him a contracting officer's warrant granting him "unlimited authority with respect to negotiations." On August 20, 1976, the parties reached what Rule and the shipyard's negotiators considered to be an oral agreement in principle which the Navy later estimated would increase the cost of the ship by about 22.7 million dollars.

The shipyard prepared a written first draft of the oral agreement which Rule received on August 30, 1976. The negotiators then met on several occasions to discuss revisions. A second draft was circulated on September 27, 1976, and further discussions concerning revisions were held. On October 7, 1976, the shipyard executed a third draft of the agreement and sent it to Rule. Although Rule signed the draft as presented by the shipyard, he conditioned his execution of the document by the following provisions set forth in his letter returning it to the shipyard:

> (i) That ultimate approval must be received from Deputy Secretary of Defense Clements, and
>
> (ii) That escalation under this Mod [i.e., modification of the contract] will be paid by the Government on the basis of the contractor's actual experience or the BLS Indices times 1.25, whichever is less.

On October 15, 1976, Deputy Secretary Clements forwarded a copy of the compromise to the Attorney General

with the recommendation that it be approved. The Attorney General, however, disapproved it on November 24, 1976.

During the negotiations dissension had arisen concerning the scope of Rule's duties. Rule thought he possessed plenary authority both to negotiate and to bind the government to any agreement he reached. Immediately after his appointment, he told the shipyard that this was the extent of his power. The Navy agreed that Rule possessed unlimited authority to negotiate, but it denied granting him unreviewable authority to bind the government to a settlement. Alerted by a news report that the shipyard considered the law suit to have been settled on August 20, Rule's superiors explicitly cautioned him several times that any agreement he reached would require approval by higher authorities. The Navy also informed representatives of the shipyard about the necessity for review and approval.

Rule himself appears to have recognized that his authority was not as unrestricted as he first supposed. In a memorandum dated October 5, 1976, he submitted the proposed agreement to the Chief of Naval Material for approval and referred to obtaining "final review and approval" from the Office of General Counsel of the Navy. Finally, the letter addressed to the shipyard accompanying Rule's executed copy of the agreement expressly conditioned his execution of the document on approval by Deputy Secretary Clements.

Shortly after Rule executed the agreement, and even before the Deputy Secretary transmitted his recommendation to the Attorney General, the shipyard moved the district court to enforce the compromise and dismiss the government's action for specific performance. In the alternative, it moved to dismiss the action on the ground that the Navy had failed to negotiate in good faith.

The court considered the shipyard's motion to enforce the settlement without conducting an evidentiary hearing. Relying on affidavits and discovery depositions, it found that Rule had authority to bind the government to the settlement he negotiated; that agreement was reached orally on August 20, 1976, and subsequently memoralized; that Deputy Secretary Clements approved the agreement; and that the Attorney General "is estopped to deny the settlement."

II

We find no reversible error in the Navy's complaint that the district court should have held an evidentiary hearing on the motion to enforce the settlement. When there is no real dispute about the facts, a court has inherent power to enforce summarily a compromise terminating pending litigation. Meetings & Expositions, Inc. v. Tandy Corp., 490 F.2d 714, 717 (2d Cir. 1974). The only conflict of any significance concerned Rule's duties. We have some doubt that the law and the evidence support the conclusion that the Deputy Secretary vested him with authority to commit the Navy to the expenditure of additional millions of dollars for the construction of the vessel. This issue, however, is not material to our decision. The uncontradicted evidence establishes that by August 25, the Navy had notified the shipyard of the necessity for review and approval of any settlement Rule negotiated. The critical question therefore is whether the August 20 oral agreement was a binding settlement as the shipyard insists and the district court found.

III

Parties to contractual negotiations may enter into an enforceable oral contract that is later to be expressed in writing if, intending to be bound, they reach agreement on all major issues. Orient Mid-East Great Lakes Service v. International Export Lines, Ltd., 315 F.2d 519, 522-23 (4th Cir. 1963); In Re: ABC-Federal Oil & Burner Co., 290 F.2d 886, 889-90 (3d Cir. 1961); 1 A. Corbin, Contracts §§ 29, 30 (1963); Restatement (Second) of Contracts §§ 26,

32 (Tent. Draft, 1973). Applying this principle to the uncontradicted facts discloses that the parties did not intend to commit themselves irrevocably to an oral settlement of the case on August 20. First, the draft agreement prepared by the shipyard after the August 20 negotiating session contained an escalation clause that computed payments by using indices prepared by the Bureau of Labor Statistics from data concerning steel vessel construction throughout the country. The Navy soon determined, however, that the shipyard's actual costs had increased less than the BLS indices. In subsequent discussions Rule insisted that the escalation clause be changed to award payments based on the shipyard's actual experience or 1.25 of the BLS indices, whichever was less. Estimating that the difference between the two clauses amounted to about 9.4 million dollars, Rule aptly characterized this issue as substantive. The final draft submitted to Rule on October 7 retained the shipyard's version of the escalation clause, and Rule expressly conditioned his execution of the draft on acceptance of the government's position. Although the shipyard had represented during the negotiations that it would relent if this issue "became . . . the hinge point" for the whole settlement, it did not accede to the condition Rule imposed. In January 1977, at the hearing on enforcement of the August 20 oral agreement, it pressed for the clause awarding the higher escalation payments.

The shipyard's final draft was essentially an offer of settlement. Rule accepted this offer subject to a condition concerning the escalation clause. Under these circumstances, the following principle of law applies: "when an offer or a counteroffer is accepted subject to a condition or reservation, neither party is bound to an agreement until the condition or reservation has been withdrawn or satisfied." Orient Mid-East Great Lakes Service v. International Export Lines, Ltd., 315 F.2d 519, 522 (4th Cir. 1963).

Second, by his letter of October 8 transmitting the executed agreement to the shipyard, Rule indicated that he did not intend the government to be bound either by the results of the August 20 negotiations or by his execution of the final draft. In this letter he conditioned his execution of the document by the statement that "ultimate approval must be received from Deputy Secretary of Defense Clements." To sustain its thesis that the August 20 agreement bound the government, the district court construed this condition to mean that Deputy Secretary Clements must "approve the document as memorializing the compromise agreement between the parties." This restrictive view of the Secretary's function is not supported either by the plain language of the letter or by any action of the Deputy Secretary. He played a far more responsible role than simply determining whether the executed document prepared by the shipyard conformed to the terms of the oral negotiations. Moreover, the Deputy Secretary did not undertake to commit the government to the settlement that Rule had negotiated. In his letter to the Attorney General of October 15, 1976, which is set forth as an appendix, he recognized that final approval rested with the Attorney General.

IV

Title 28 U.S.C. §§ 516 and 519 authorize the Attorney General to supervise all litigation involving an agency of the government unless the law otherwise directs. As an incident to this broad grant, he has authority to agree to dismissal of actions brought by the government. *See* Confiscation Cases, 74 U.S. (7 Wall) 454, 458 (1868). His authority to compromise and settle any case referred to the Justice Department was expressly confirmed by § 5 of Executive Order No. 6166, June 10, 1933, 5 U.S.C. § 901.*

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* Section 5 of Executive Order No. 6166 provides in part:

> As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision

Notwithstanding these well established principles, the district court held that the Attorney General was estopped from disapproving the settlement for two reasons. First, it noted that during oral argument the Department of Justice stipulated that when Rule was appointed he had authority to bind the United States. The government, however, protests that it made no such stipulation or concession. It points to portions of the transcript where it specifically denied that Rule could bind the government while recognizing that he had authority to negotiate with the shipyard. The shipyard in its brief does not claim that the government made such a concession, and we have been unable to find it in the record.

The second reason the district court assigned for its ruling is that the Justice Department took no action to fulfill its obligation to negotiate in good faith pursuant to the court's order "except through its implicit delegation of any authority it had to settle this litigation to the Department of Defense." We conclude that this reason does not provide a sufficient basis for invoking estoppel.

The negotiations concerning settlement of the litigation between the shipyard and the Navy covered many technical issues about the construction of the vessel, the computation of its cost, and a feasible date for its delivery. It was therefore reasonable for the Justice Department attorneys to leave discussion of these complex subjects to Navy officials who had the expertise to deal with them. But another important question was whether the government should press its suit for specific performance of the initial contract instead of compromising, in view of the millions of dollars involved. The answer to this question depended on careful analysis of the strength of the government's claim from

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whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

both evidentiary and legal standpoints. In turn, the disclosures of that survey had to be weighed against the results of Rule's negotiations. The final product of this study was an assessment of the litigative risk.

The Attorney General did not, either personally or through his subordinates, delegate to Rule the authority to make this critical decision. Moreover, Deputy Secretary Clements, who was the source of Rule's authority, understood that the responsibility for evaluating the litigative risk and consequently for ultimately approving or disapproving the settlement remained with the Attorney General. We therefore conclude that the record does not support the court's ruling that the Attorney General was estopped. The law pertaining to the Attorney General's control over cases referred to the Department of Justice by other agencies of the government fully sustains his authority to disapprove the proposed compromise.

V

As an alternative ground for dismissing the government's suit for the specific performance of the construction contract, the district court held that the government was barred by the doctrine of unclean hands because it did not negotiate in good faith. The controversy about the government's negotiating tactics centers on the parties' August 29, 1975, stipulation which was incorporated in the court's order. In view of the dispute about the validity of the Navy's option, the parties stipulated that they would "negotiate in good faith to reach an agreement as rapidly as possible to modify those contract provisions requiring amendment or to take other appropriate action." The nub of the issue is the clause "to take other appropriate action." The shipyard contends that this language was intended to impose a duty on the parties to renegotiate the basic contract for the construction of the vessel. Although there was some difference of opinion in its ranks about the meaning of the language, the Navy asserted, at least until the time Rule was appointed its chief negotiator, that it

was required to bargain over the basic contract only if the shipyard offered some new legal consideration or demonstrated governmental responsibility justifying more favorable terms.

The Navy's claim of good faith is altogether consistent with paragraph five of the stipulation, which provided, "This stipulation and any action taken by either party pursuant hereto shall be without prejudice to the rights or legal positions of either party." The Navy was not obligated to abandon its legal position in order to demonstrate good faith bargaining if its insistence was sincerely held. NLRB v. Almeida Bus Lines, Inc., 333 F.2d 729, 731 (1st Cir. 1964). Although the underlying facts were not in dispute, there was a controversy as to the inferences that could properly be drawn from them. In the context of this controversy, the clause "to take other appropriate action" is ambiguous; there is a genuine dispute about its meaning. Under these circumstances, summary disposition of the case on the basis of the defense of unclean hands is inappropriate. American Fidelity and Casualty Co. v. London and Edinburgh Insurance Co., 354 F.2d 214, 216 (4th Cir. 1965).

The judgment of the district court is reversed, and the case is remanded for further proceedings consistent with this opinion.

APPENDIX

THE DEPUTY SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301

15 October 1976

The Honorable Edward Levi
Attorney General
Department of Justice
Washington, D.C. 20530

Dear Mr. Levi:

This letter forwards a proposed settlement of the CGN-41 litigation negotiated pursuant to Court Order. As you know, I have been deeply committed to efforts to settle the Navy's on-going disputes with the shipbuilding industry and have undertaken a number of initiatives to this end. In a meeting on 13 July 1976, Senior Navy Officials, with my approval, appointed Mr. Gordon W. Rule of the Naval Material Command as the principal negotiator of this particular matter. Mr. Rule has negotiated a proposed modification to the contract with Newport News, attachment (1), on the CGN-41.

In view of the long-standing, acrimonious, and disruptive controversy between the Navy and its sole present new construction surface nuclear warship contractor, I consider it vital to the national defense that this dispute be resolved as quickly as possible. I consider the proposed modification a reasonable resolution to this complex matter.

Attachment (2) provides a comparative financial estimate of the proposed settlement. While attachment (2) indicates a difference of $22.7M I believe it is reasonable to assume that a Court might grant Newport News, as a minimum, an extension of the existing escalation coverage to an achievable contract delivery date (e.g., August 1980); consequently, the difference in the settlement could be re-

duced another $7.5M, to $15.2M. We have not included any other assessment of litigative risk since this is a matter under your purview. Quantifying the latter could further reduce or eliminate the $15.2M differential noted above.

In any event, the District Court instructed the parties as follows: "The parties agree to negotiate in good faith to reach an agreement as rapidly as possible to modify those contract provisions requiring amendment or to take other appropriate action." Mr. Rule, in the spirit of this order, negotiated a contract modification which, if approved, would undoubtedly facilitate the construction of the badly needed CGN-41.

Accordingly, I am forwarding the results of these negotiations for your approval and such legal action as may be necessary to obtain ratification.

/s/ W. P. Clements, Jr.

Attachments

ADDENDUM B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Newport News Division

CIVIL ACTION
No. 75-88-NN

UNITED STATES OF AMERICA, *Plaintiff*

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, and TENNECO INC., *Defendants*

Memorandum Opinion

I

JURISDICTION AND PARTIES

The plaintiff, the United States of America, has brought this action seeking specific performance of a shipbuilding contract it purports to have entered into with the defendant, Newport News Shipbuilding and Dry Dock Company (the Shipyard). Defendant, Tenneco Inc. is the parent corporation of the Shipyard, and its liability is allegedly based on its guarantee of the Shipyard's contractual duties.

The Court has jurisdiction pursuant to 28 U.S.C. § 1345.

II

NATURE OF THE MOTION BEFORE THE COURT AND THE COURT'S RESOLUTION OF THE ISSUES PRESENTED

The Shipyard here contends that a valid compromise agreement has been reached between itself and the United States which moots and settles all of the issues presented

in the Government's action; it moves for an entry of judgment to enforce the settlement and to dismiss this litigation, and in the alternative, for a dismissal with prejudice of the Government's action because of its bad faith toward this Court and the defendants. The United States maintains that it has negotiated towards the settlement in good faith, but that any agreement reached between the Shipyard and the Government is invalid for a variety of reasons.

We have no problem with the case and hold that a compromise agreement has been reached; that it is binding on the United States; that the matters before the Court are moot; and that judgment should be entered enforcing the settlement and thus dismissing the litigation.

We find that the United States voluntarily bound itself, contractually and by the consent order of this Court, to negotiate in good faith to resolve all of the disputes between itself and the Shipyard with respect to the construction of the DLGN-41. The United States utterly failed, until the appointment of Gordon Rule, to so negotiate in good faith. It insists that it was only required to negotiate certain items and not all of the matters that are in dispute. This false insistence evidences the Government's complete bad faith toward this Court and the Shipyard. The Government, as well as the defendants, had every right to seek a quick judicial determination of their respective rights under the disputed contract. However, the parties agreed to an order entered in this Court, on August 29, 1975 and again a year later, that judicial action should be stayed to allow the parties to negotiate in good faith to resolve all their differences. Had we been aware that the Government would later attempt to assert that it was not required to so negotiate, this Court would never have entered the stipulated agreement of the parties to negotiate as an order. We would have moved the parties along to a swift adjudication of the validity of the disputed contract.

We conclude that sovereign immunity does not deprive this Court of jurisdiction to declare that the compromise agreement here binds the United States. The Department of Defense, in this case, delegated its executive authority to Gordon Rule to bind the United States to an agreement which compromises and settles the rights of the parties to this suit. We need not reach the issue whether it would have been proper for the Department of Defense, once the disputed contract became the subject of litigation, to negotiate a compromise agreement without the consent and ap-approval of the Department of Justice. That issue is not before the Court because the Department of Justice represented to this Court, in August, 1975, that the United States would be bound to negotiate in good faith, and yet we find that the Department of Justice has refused to directly participate in any of the negotiations over the past seventeen months. The United States here is estopped to deny the authority of the Department of Defense to bind the United States to a compromise agreement.

We find that the United States is fully bound to the compromise agreement negotiated on August 20, 1976 between Gordon Rule, for the Government, and the Shipyard. This agreement is evidenced by the documents executed by Rule which memorialize the prior oral agreement. The documents which speak to the compromise agreement are Contract Modification P00037 and Rule's cover letter imposing two conditions.

These documents satisfy any statute of frauds requirement. There was a meeting of the minds of the parties on August 20, 1976; there is adequate consideration to support this compromise agreement; and failure to provide cost of pricing data does not invalidate the agreement. We find that Deputy Secretary of Defense Clements, who initiated the negotiation efforts, has approved the compromise agreement.

III

The Facts

A

The Disputed Contract: June 25, 1970 to August 25, 1975

This acrimonious confrontation between the United States Navy and the Newport News Shipyard over the construction of the DLGN-41, a nuclear-powered guided missile frigate, a high priority national defense item, is considerably affected by the public interest.

On June 25, 1970 the Navy entered into a contract (Contract N00024-70-C-0252) with the Shipyard for the preconstruction preparation necessary for the construction of a nuclear guided missile frigate, DLGN-38. This contract also contained an option exercisable by the Navy for the actual construction of the DLGN-38.

Subsequently various documents, identified as Contract Modifications P0001 *et seq.*, have been executed and enlarged the scope of the original contract, and modified its terms. The most important of these, for our purposes, are Contract Modifications P0007, P00018, P00024, and P00037. They raised issues upon which the parties disagree as to their legal effects.

P0007 was executed on December 21, 1971. Therein the Navy purported to exercise its construction options for the DLGN-38 and two ships of the same class, the DLGN-39 and 40. In addition, P0007 in Article 28 granted the Navy two options for the construction of two additional ships of the same class, the DLGN-41 and DLGN-42, the options to be exercised by February 1, 1973 and February 1, 1974 respectively. The Shipyard does not admit these legal effects.

On February 1, 1973 the parties executed P00018. The United States maintains that this document amended Article 28 to extend the time for the exercise of the construction options for DLGN-41 and DLGN-42 by two years. Two provisions are important for our purposes. One is the option provision which the Navy purported to exercise which states:

> On or before 1 February 1975, the Government, by modification to this contract, may require the contractor to construct and deliver DLGN 41, but only if the Government, by modification to this contract, by 1 December 1973, authorizes the contractor to expend funds in an amount of $29,062,200 for material procurement, shop fabrication, and other preliminary work.

The second relevant provision states:

> The Parties agree to negotiate in good faith to reach an agreement as rapidly as possible on the provisions of this contract which require modification in order to express the agreement of the parties as to new option provisions for DLGN 41 and DLGN 42. Therefore, such contract modification will:
>
> (i) establish a target cost, a target price, a ceiling price, and a share ratio within the profit-cost envelope set forth below for each option so exercised separate from that for the other ships under this contract, and revise Article 7, entitled "Limitation of Contractor's Liability for Correction of Defects" to provide a limitation on the Contractor's liability for correction of defects for each vessel to two percent (2%) of the initial Target Price for that vessel,
>
> (ii) provide for a total final negotiated cost pursuant to Article 5 hereof entitled "Incentive Price Revision (Firm Target)" separate from that for DLGN 38, 39 and 40 combined,

(iii) establish escalation tables separate and different from those for the DLGN 38, 39 and 40 combined,

(iv) modify the payment provision as necessary to provide payment for DLGN 41 and 42 separate from DLGN 38, 39, and 40,

(v) revise the project milestones in Articles 17 for DLGN 41 and 42,

(vi) establish a fixed fee, and other terms and conditions on account of the work which may be required by the Option Conditions described below which will be effective until the corresponding option is exercised, or the work, which may have been continued pursuant to the direction of the Contracting Officer, stops,

(vii) contain a provision for computing equitable adjustment on account of changes in the Longshoremen and Harbor Workers' Act, the Federal Insurance Compensation Act, state workmen's compensation, unemployment, disability compensation and public liability acts occurring since June of 1970, and

(viii) revise Schedule "A" to provide for DLGN 41 and DLGN 42 equipment delivery schedules the same as those listed for DLGN 39.

If, despite the best efforts of both parties, the aforesaid agreement is not executed before the Government exercises either or both options, the parties agree that interim billings will be in accordance with the terms and conditions of the payment provision for the DLGN 38, 39 and 40 using the maximum profit-cost envelope . . . until such time as the aforesaid agreement is reached, said interim billings not to exceed total incurred costs for DLGN 41 and DLGN 42.

On November 29, 1973 the parties executed P00021. The United States maintains that modification extended the delivery dates for the DLGN-41 and DLGN-42 to October 1978 and June 1979 respectively, in return for an extension of the date by which the Navy must provide funding for the preconstruction work on the DLGN-41 and DLGN-42 in order to exercise the options for actual construction. On February 27, 1974 the Navy executed P00022 which recites that the Shipyard is authorized to expend 35 million dollars to accomplish the preconstruction work on the DLGN-41. The bulk of this authorization was a prerequisite under Article 28 to an exercise of the DLGN-41 construction option.

The Shipyard does not agree with the Government as to the legal effects of these modifications, and maintains, and we find as a fact, that it notified the Navy during August 1974 that it no longer considered the DLGN-41 option to be valid.

The Navy was well aware of the Shipyard's position when, on January 31, 1975, it executed P00024 which recites that the Navy exercises its construction option for the DLGN-41. In fact, the Shipyard and the Navy agreed, prior to the execution of P00024, that an agreement, which was contained in a document entitled a Memorandum of Understanding, would become effective on February 3, 1975. Under this agreement, which was to remain in effect for at least thirty days and to continue until one party had given forty-eight hours' notice, the Shipyard agreed to continue the preconstruction work for the DLGN-41, and each party agreed

> . . . to negotiate in good faith to reach an agreement as rapidly as possible to modify those contract provisions requiring amendment *or to take other appropriate action.* [Emphasis added.]

Some attempts to negotiate were made by both parties; however, they failed because of the parties' disagreement

over the meaning of the phrase, "or take other appropriate action." The same language was incorporated into the Court's order of August 29, 1975. Certain elements in the Navy maintain that this phrase did not obligate the Navy to negotiate outside of the eight specific items which the Navy was already obligated in February 1975 to negotiate pursuant to P00018. We find this contention to be incredible in light of the drafters' deliberate rejection of language which would have specifically limited negotiations to those eight areas contemplated by P00018, and in light of the fact that the Shipyard consistently maintained that the exercise of the DLGN-41 option was invalid.

On May 28, 1975 the Navy sent the Shipyard a letter advising the Shipyard of the Government's maximum acceptable position. This Navy position basically was that the exercise of the DLGN-41 construction option was valid and therefore the Navy was not required to negotiate outside of the eight items in P00018; this meant no change in the October 1978 delivery date or the production schedule, no change in target cost, profit, or ceiling price, and no change in the incentive formula. The Navy would not negotiate outside of the eight items to accomplish a modification of the contract unless the Shipyard could prove that it was entitled to an equitable adjustment due to Government responsibility, or the Shipyard could furnish new consideration.

The disputed contract for the construction of the DLGN-41 is a fixed-price, incentive-type contract, with a cost-price envelope defined in terms of a target cost, target profit, target price, and ceiling price as follows:

Target cost	$	76,050,000
Target profit	+	9,691,000
Target price	$	85,741,000
Ceiling price	$	100,951,000

The contract compensation provisions also contain adjustment and escalation clauses for the contingencies that actual costs may exceed target costs, and that there may be inflation of labor and material costs.

On August 25, 1975 the Shipyard notified the Navy that it was exercising its right to cancel the Memorandum of Understanding, and that all preconstruction work on the DLGN-41 would be suspended as of August 27, 1975.

B

The Court's Order: August 29, 1975 to July 13, 1976

On August 29, 1975 the United States filed in this Court its complaint and a motion for a preliminary injunction and a temporary restraining order. On that same day, a hearing was held before the Court on the motion for a temporary restraining order. It was at this hearing that the Court first became aware of the positions of the parties. The Shipyard maintained that the exercise of the DLGN-41 construction option was invalid because: (1) there were insufficient appropriations, that the exercise was in contravention of 41 U.S.C. § 11(a), 31 U.S.C. § 665(a), and the Armed Services Procurement Regulations (ASPR): (2) the Navy had failed to notify the Shipyard of the specifications for the DLGN-41; and (3) under various legal theories, the option was unenforceable, *e.g.* commercial impracticability.

After arguments on the TRO motion and a brief recess, the parties asked the Court to allow an agreement, which had been reached between the parties, to be read into the record and to be entered as an Order of the Court. The Court, believing that all good faith attempts to reach a settlement should be encouraged, agreed. This Order, by the Court, mooted the TRO issue and stayed the judicial proceedings. It directed, first, that the Shipyard would immediately resume the preconstruction work and proceed to

undertake construction of the DLGN-41. The Navy agreed to pay for such work. In addition, all changes heretofore made in the specifications for the earlier DLGN-38, 39 and 40 were to be considered as incorporated into the specifications for the DLGN-41, and the parties agreed to negotiate in good faith the appropriate equitable adjustments for all specification changes. Second, it stated that:

> The parties agree to negotiate in good faith to reach an agreement as rapidly as possible to modify those contract provisions requiring amendment or to take other appropriate action.

Third, the parties agreed to urge the Comptroller General to expedite his opinion on the issues previously submitted by the Shipyard concerning whether the exercise of the DLGN-41 construction option violated 41 U.S.C. § 11(a), 31 U.S.C. § 665(a), or the ASPR's.

Mr. Jeffrey Axelrad, representing the United States and the Department of Justice, stipulated to the Court that E. Grey Lewis, the Navy's General Counsel, would "undertake to ensure the Navy's obligation" to negotiate under the Order.

Unfortunately, the United States' agreement to negotiate has been undercut by the existence of diverse points of view within the Navy, with the result that the record discloses, without possible peradventure, that the United States has fully and totally ignored not only its own February, 1975 agreement, but also the Order of this Court, that negotiations in good faith should ensue. Even before the Memorandum of Understanding took effect on February 3, 1975 there was an effort within the Navy to limit negotiations only to certain items listed in P00018. Although counsel for the United States, Mr. Axelrad, in open court acknowledged that the Navy's General Counsel would ensure the Navy's compliance, on October 29, 1975, Mr. Lewis, that

General Counsel, was ordered by higher Navy officials to stop all negotiations.

Despite the Navy's appointment of two succeeding chief negotiators, we find that in the eleven months following our August 29, 1975 Order, the United States *totally* failed to meet its obligations to negotiate in good faith, although at the same time it was receiving the benefits of the Shipyard's continued performance under the disputed contract.

C

Rule's Appointment and the Compromise Agreement: July 13, 1976 to date

On July 13, 1976 the Shipyard instituted, by a motion, an effort to enforce the United States' agreement to negotiate in good faith and it asked the Court to suspend the Shipyard's obligation under the Order of August 29, 1975, to continue work on the DLGN-41 until the United States did undertake to negotiate in good faith to resolve all disputes between the parties concerning the DLGN-41.

On that same date, July 13, 1976, Gordon Rule was summonsed, with others, to the office of Deputy Secretary of Defense Clements to a meeting concerning the DLGN-41 dispute. The United States has claimed executive privilege concerning certain Government minutes of meetings, documents, and records of conversations, which frankly the Court has viewed with an eye to ruling thereon. However, there is ample evidence in the record, to which no privilege is asserted, to justify our findings of fact that:

1. Gordon Rule was appointed by the Deputy Secretary of Defense as chief negotiator for the DLGN-41 dispute with the authority to bind the United States to a compromise agreement. *In fact, the United States admitted this fact during its argument on January 13, 1977.*

2. Deputy Secretary Clements instructed Rule that he wanted to see four items negotiated in any DLGN-41 compromise agreement: (a) a new escalation clause; (b) a new "changes in the law" clause; (c) a new ceiling price; and (d) a new delivery schedule.

3. Rule was appointed as chief DLGN-41 negotiator in direct response to the Shipyard's filing of its July 13, 1976 motion.

4. Deputy Secretary of Defense Clements specifically called this meeting of July 13, 1976 for the purpose of prodding the Navy to reach a DLGN-41 compromise agreement with the Shipyard. In this regard Clements instructed the high Navy officials in attendance that they should thereafter meet with him on a daily basis to keep him informed of Rule's progress in negotiating a compromise.

5. The Shipyard interpreted the appointment of Rule as an indication of the United States' willingness to negotiate, for the first time, in good faith. As a result, the Shipyard asked this Court, on July 19, 1976, to stay action on its July 13, 1976 motion.

6. On July 16, 1976 Assistant Secretary of the Navy Bauers issued a memorandum which designated Rule as the Navy's chief DLGN-41 negotiator. On August 19, 1976 the Navy issued Rule a Certificate of Appointment as Contracting Officer which recited that he had *"unlimited authority"* to negotiate with the Shipyard concerning the DLGN-41 negotiator. On August 19, 1976 the Navy issued Rule a Certificate of Appointment as Contracting Officer which recited that he had *"unlimited authority"* to negotiate with the Shipyard concerning the DLGN-41 contract dispute. It is significant that Bauers' memorandum recites that Rule was appointed, after consultation with the Department of Justice, to deal directly with the Shipyard, without the involvement of the Department of Justice, and that Rule was to be assisted by the Navy's General Counsel.

7. Rule is a high ranking civilian Navy employee who is normally assigned as the Director of the Procurement Control and Clearance Division in the Office of the Chief of Naval Material. It is his job function to approve or disapprove the business clearance on all Navy procurement contracts. He is referred to as the "top civilian contracting officer in the Navy." Rule had previously signed for the United States an unrelated contract modification involving over $1,037,000,000.

8. Serious negotiations between Rule and the Shipyard began on July 15, 1976, continued on an almost daily basis, and resulted on August 20, 1976 in an oral agreement between Rule and the Shipyard on all of the outstanding substantive issues concerning the construction of the DLGN-41, including those specifically charged to him by Secretary Clements. The negotiators agreed that a written document, to be labelled Contract Modification P00037, would confirm and memorialize the terms of the August 20, 1976 agreement.

9. On August 20, 1976 the parties orally agreed to a change in the delivery date from October 1978 to August 1980, to a new escalation clause appropriate to the new delivery date, to new and separate fringe benefits and energy cost provisions, and to agree later on a new "changes in the law" provision as they were already obligated to do under the earlier P00018.

10. At the completion of the August 20, 1976 meeting the parties intended themselves to be bound by the agreement reached and only contemplated a memorialization of this agreement in a written document.

Despite the United States' admission that Rule was initially appointed with full authority to bind the United States, an effort was mounted within the Navy before August 20, 1976 to undercut Rule's specific authority, and to bring it under further *Navy* scrutiny. Even in the face of that internal Navy effort, such action would not have re-

voked Rule's authority as granted by the Deputy Secretary of Defense on July 13, 1976, and by Assistant Secretary of the Navy Bauers, on July 16, 1976, and as expressed as "unlimited" in the Contracting Officer's warrant issued.

Further Navy efforts to undermine Rule's authority occurred after the agreement was reached on August 20, 1976. On August 30, 1976 an Admiral Michaelis sought to appoint a review panel of three Navy persons, and purported to grant them the sole final authority to bind the Navy to a compromise agreement.

On August 23, 1976 Rule met with Deputy Secretary Clements and reported to him that an agreement had been reached with the Shipyard on August 20, 1976. On August 25, 1976 Admiral Reich, a top consultant to Clements, approved a press release announcing that a settlement agreement had been reached.

A final draft, setting forth the agreement as reached on August 20, 1976, was prepared by the Shipyard, and signed by Rule, subject to two conditions, on October 7, 1976, at 6:00 P.M. On the morning of October 8, 1976, Rule was called to his immediate superior's office where he was handed a document which stated:

> . . . you do not have the authority to bind the Government contractually on the proposed modification to CGN-41 contract until the legal and business reviews have been completed . . . .

This document, although dated October 7, 1976, was received by Rule on the morning of October 8th.

Rule delivered Contract Modification P00037 to the Shipyard but expressly conditioned his execution and delivery of the document on the conditions that:

(1) Clements approve the document as memorializing the compromise agreement between the parties; and

(2) the labor escalation clause contained in P00037 be modified to provide that the Shipyard would receive the

lesser of its actual experience in escalated labor costs, or 125% of the Bureau of Labor Statistics indices. These conditions were dictated to a secretary, in the presence of the Shipyard's agent, and later incorporated in the cover letter for the executed P00037.

Later, on October 8, a memorandum from a Navy Captain Thompson was sent to Rule's office, reciting that Rule's warrant as a Contracting Officer was revoked.

On October 15, 1976 Deputy Secretary of Defense Clements forwarded a copy of the writings executed by Rule to Attorney General Levi. In his cover letter Clements states that the writings present *"a reasonable resolution of this complex matter."* He further states:

> In any event, the District Court instructed the parties as follows: "The parties agree to negotiate in good faith to reach an agreement as rapidly as possible to modify those contract provisions requiring amendment or to take other appropriate action." Mr. Rule, in the spirit of this order, negotiated a contract modification which, if approved, would undoubtedly facilitate the construction of the badly needed CGN-41.

The Department of Justice has since informed the Court that the Attorney General would disapprove the Rule compromise agreement and contends that therefore there is no compromise agreement binding on the United States.

IV

Conclusions of Law

A

The United States' Failure to Act in Good Faith toward this Court and the Shipyard

Even if there is a valid contract the breach of which would entitle the aggrieved party to a damage remedy at law, the specific performance of that contract is not a matter of right under either federal or state law. The granting

of the remedy of specific performance rests in the sound discretion of the trial court, which is to exercise its discretion according to the established principles of equity and the facts of the case, Williston on Contracts § 1418 (3rd Ed., 1976 Supplement) citing among other cases, *Manufacturers' Finance Co. v. McKay*, 294 U.S. 442, 55 S.Ct. 444 (1934); *Barnes v. Sind*, 341 F.2d 676 (4th Cir. 1965); *Raney v. Barnes Lumber Corp.*, 195 Va. 956, 970, 81 S.E.2d 578, 586 (1954).

A fundamental equity principle is that one who asks for specific performance of a contract must have "clean hands"; he must have acted in a fair and equitable fashion with respect to the party against whom he seeks to have the contract enforced.

Long before the Navy purported to exercise its option rights on January 31, 1975, the Shipyard informed the Navy that it considered the DGLN-41 construction option to be void. If this litigation had proceeded to trial, this Court would have been required to pass on the validity of the original DLGN-41 option provision. However, the Court's decision today that the subsequent compromise agreement is binding on the United States moots this issue and settles this litigation.

Certain personalities within the Department of the Navy have taken the position that the Navy should not negotiate with the Shipyard on the matters required to be negotiated pursuant to the January 31, 1975 Memorandum of Understanding and, of more importance to us, *this Court's Order of August 29, 1975.* The Navy was not coerced by anyone, including this Court, to agree to negotiate in good faith to resolve the DLGN-41 dispute. The Government, if it were so positive of the validity of the original option provision, could have had this Court's final adjudication of the validity of that provision within six or seven months after the filing of its complaint. However, the United States, through its Department of Justice, represented to this Court that no immediate adjudication of the validity of the disputed

option provision was desired, but rather that good faith efforts would be undertaken by the Navy to resolve this dispute through an out-of-court compromise agreement, and that while the Court's Order remained in effect the Shipyard would be obligated to continue its construction of the DLGN-41, despite its contention that the exercise of the option contract was invalid.

If that group within the Navy which disapproved of any negotiations or settlement of the DLGN-41 dispute had attained ascendancy in the Navy's decision-making hierarchy, they could have asked this Court to revoke its Order of August 29, 1975, and to proceed to adjudicate the validity of the exercise of the option. This did not occur. Instead the official position of the Government was that good faith negotiations to resolve all of the DLGN-41 dispute were desired, while certain Navy elements were even then undercutting the progress of any efforts toward good faith negotiation. We do not decide whether it was in the best interests of the United States to negotiate or to litigate the DLGN-41 dispute; we only conclude that the Navy, and the United States, has not acted in good faith. For this reason, the United States does not have clean hands to ask this Court to specifically enforce the original DLGN-41 construction option.

B

A Declaratory Judgment that the United States is Bound by the Compromise Agreement is Justified

The United States has raised numerous legal objections to the validity and enforceability of the August 20, 1976 compromise agreement. These objections include: (1) that sovereign immunity deprives the Court of jurisdiction to declare that the United States is bound by a compromise agreement which settles and moots this action; (2) that Rule lacked authority to bind the United States; (3) that the August 20, 1976 agreement is unenforceable because it

was oral; (4) that there has been no meeting of the minds; (5) that the compromise agreement is void because of the Shipyard's failure to provide the Government with cost and pricing data; (6) that Rule could not bind the United States without the approval of the Attorney General; and (7) that the compromise agreement is not supported by adequate consideration. While we consider some of these charges to be of no moment, nevertheless, we separately address each of these legal objections and conclude that none of them prevent the compromise agreement from binding the United States.

1

Sovereign Immunity

We need not dwell long on the two sovereign immunity arguments raised by the United States. By granting judgment for the Shipyard neither do we grant a damages judgment against the United States, nor do we order the equitable reformation of a contract to which the United States is a party. We merely declare that the parties are legally bound by a compromise agreement. This compromise agreement moots the issue as to whether that prior contract was enforceable.

Certainly if the facts show that the issues are moot in a suit brought by the United States for specific performance of a contract, the Court has jurisdiction, under 28 U.S.C. § 1345, to so find, and to dismiss with prejudice the Government's case. It make no practical difference whether the Court's judgment is styled a dismissal with prejudice because of mootness, or a declaratory judgment for the defendant that the settlement agreement is binding. The *res judicata* and *collateral estoppel* effects are the same.[1]

[1] We find it a little tenuous for the Government, after instituting this suit in this Court, to now question the jurisdiction of the Court to hear and determine the whole matter, including a bona fide settlement of the dispute.

We need not decide whether the enactment on October 21, 1976 of Public Law 94-574, 90 Stat. 2721, which amends 5 U.S.C. § 702, grants this Court any additional jurisdiction with respect to this litigation.

2

Rule's Authority

The United States admits that Gordon Rule had complete and final authority to bind the United States when he was appointed on July 13, 1976, as chief Navy negotiator in the DLGN-41 dispute. However, the United States contends that, subsequent to his appointment and prior to any agreement reached between himself and the Shipyard, his authority was limited to the negotiation of a proposed settlement, which required the further approval of a higher authority in the Departments of Defense or Navy, and the approval of the Attorney General. We disagree.

Gordon Rule was appointed as the Navy's chief negotiator for the DLGN-41 dispute by Deputy Secretary William P. Clements during a meeting held in Clements' office attended by the high-level Department of Defense and Navy personnel concerned with this dispute with the Shipyard. Rule's appointment was in direct response to the Shipyard's having filed a motion to compel the United States to comply with this Court's Order of August 29, 1975. *It was Mr. Clements' stated and recorded belief that the Navy had failed so far to negotiate with the Shipyard in good faith.* The Department of Justice admits that the Attorney General was aware of this grant of authority to Rule.

The Justice Department attempts now to discredit the settlement worked out by Rule. It suggests that Rule did not act with the best interests of the United States in mind. We find nothing in the record to support this view. In fact, Rule was appointed by Clements because of his reputation in negotiating settlements with contractors. That segment

of the Navy command which was upset at Rule's appointment, but was then unable to prevent it, now attempts to discredit his completed settlement.

On August 19, 1976 Rule was issued a contracting officer's warrant signed by Captain Gerald J. Thompson, Deputy Chief of Naval Material. That document stated that Rule had "*unlimited authority to negotiate with the Shipyard concerning the DLGN-41 dispute.*" This warrant was not revoked until October 8, 1976. It is incredible to the Court that the United States now maintains that "unlimited authority to negotiate for the United States" does not include the authority to bind the United States. This argument is contrary to the dictates of common sense and the English language. If the warrant authority did not include the power to bind the United States, why did certain Navy officials feel the need to revoke the warrant on October 8, 1976? Rule had signed and delivered the draft setting out the Contract Modification P00037 prior to this revocation.

3

Statute of Frauds

The United States claims that even if Rule had the authority on August 20, 1976 to bind the United States, any agreement reached on that date would not be enforceable because it was oral.

The United States contends that 31 U.S.C. § 200(a) establishes that an agreement must be evidenced by documents before it can be binding on the United States. This provision states in pertinent part:

> After August 26, 1954 no amount shall be recorded as an obligation of the Government of the United States unless it is supported by documentary evidence of—
>
> (1) a binding agreement in writing between the parties thereto, including Government agencies, in a manner and form and for a purpose authorized by law,

> executed before the expiration of the period of availability for obligation of the appropriation concerned for specific goods to be delivered, real property to be purchased or leased, or work or services to be peformed; or
>
> * * *
>
> (6) a liability which may result from pending litigation brought under authority of law; or
>
> * * *
>
> (8) any other legal liability of the United States against an appropriation or fund legally available thereto.

The Government cites *United States v. American Renaissance Lines, Inc.*, 494 F.2d 1059 (1974) where the Court of Appeals for the District of Columbia Circuit held that an oral charter agreement was unenforceable against the United States because of § 200(a). That Court rejected the argument that § 200(a) was merely "a recordation statute to facilitate auditing" by Congress of the Executive's spending in order to determine future appropriation requirements; rather it held that the statute makes oral contracts with the Government unenforceable. It is unnecessary for us to reach the issue whether § 200(a) is applicable to the August 20, 1976 compromise agreement for we find that the requirements of § 200(a) have been met under both subsections (1) and (6).

Under subsection (1) the oral compromise agreement on August 20, 1976 is evidenced by the document (Contract Modification P00037) which Rule signed on October 7, 1976, and the cover letter of October 8, 1976.

Secondly, the requirements of subsection (6) have been met. The oral agreement which was reached on August 20, 1976 was negotiated pursuant to this Court's Order of August 29, 1975. This oral agreement entered into by the duly authorized agents of the parties to this pending litigation

certainly establishes the liability of the parties after this Court accepts that agreement as the settlement of this action.

4

Meeting of the Minds

The United States maintains that there was no meeting of the minds on August 20, 1976 and therefore no binding agreement. As evidence of this contention they cite the parties' agreement that a draft of the agreement be formalized. It is well settled that the mere fact that the parties contemplated a reduction of an oral agreement to writing does not prevent the agreement from becoming binding as of the date of the oral agreement. Here, a draft was agreed to in order to correctly reflect the August 20th oral agreement.

The precise language and operation of the labor costs escalation clause had been a major item of disagreement between the parties in the negotiations. The parties agreed on August 20th to grant the Government the most favorable escalation provision as disclosed by the Shipyard's actual experience. In the original DLGN-41 construction option contained in Article 28 of P0007, the Shipyard was to receive the lesser of its actual experience *or* 125% of the Bureau of Labor Statistics' index for wage costs. The basic writing signed by Rule on October 7, *i.e.*, Contract Modification P00037, recited only that the Shipyard would receive 125% of the BLS index irrespective of its actual experience; however, Rule conditions his signing and delivery of the document on the modification of the writing to go back and incorporate the same type provision as was in force in P0007. The Shipyard has agreed. We find that this modification by Rule of P00037 reflects the substance of the oral agreement reached by the parties on August 20, 1976. 17 C.J.S., Contracts, § 31.

At the August 20th meeting the parties did not work out the specific language for a labor cost escalation clause. At subsequent sessions it was found that all parties were operating under the mistaken impression that the Shipyard was experiencing a rate of increase in labor costs greater than the BLS index. To give the Government the best position, the 125% of the BLS index provision was chosen to reflect the August 20, 1976 agreement. When, however, by October 7, it became known that the Shipyard had sometimes been experiencing a rate of increase in labor costs less than the BLS index, the change in language imposed by Rule was appropriate to reflect the actual August 20, 1976 agreement.

We need not worry whether the parties contemplated on August 20, 1976 that approval by Deputy Secretary Clements was necessary to bind the Government, for we find that Clements, in any case, has granted such approval. In his letter of October 15, 1976 to Attorney General Levi, Clements granted his approval to the Rule compromise agreement. We do not agree with the Government that Clements must use the magic words "I approve" before this Court can conclude that Clements in fact has approved the compromise agreement. Clements stated:

> In view of the long-standing, acrimonious, and disruptive controversy between the Navy and its sole present new construction surface nuclear warship contractor, I consider it vital to the national defense that this dispute be resolved as quickly as possible. I consider the proposed modification a reasonable resolution to this complex matter.

5

Failure to Provide Cost or Pricing Data

The United States argues that the compromise agreement negotiated between Rule and the Shipyard is not

binding on the Government because the Shipyard failed to submit cost or pricing data to the Government. This argument rests on the proposition that such data is required by Armed Services Procurement Regulations (ASPR) § 3-807.3 and by statute, 10 U.S.C. § 2306(f), that the absence of such data invalidates the agreement, and that the requirements cannot be waived. 10 U.S.C. § 2306(f) states in pertinent part:

> A prime contractor or any subcontractor shall be required to submit cost or pricing data under the circumstances listed below, and shall be required to certify that, to the best of his knowledge and belief, the cost or pricing data he submitted was accurate, complete and current—
>
> * * *
>
> (2) Prior to the pricing of any contract change or modification for which the price adjustment is expected to exceed $100,000, or such lesser amount as may be prescribed by the head of the agency . . . .

Section 3-807.3 of ASPR [32 C.F.R. § 3.807] implements this statute and provides:

> (a) The contracting officer shall require the contractor to submit, either actually or by specific identification in writing, cost or pricing data in accordance with 16-206 of this chapter and to certify by the use of the certificate set forth in 3-807.4, that, to the best of his knowledge and belief, the cost or pricing data he submitted was accurate, complete and current prior to:
>
> * * *
>
> (2) the pricing of any modification to any formally advertised or negotiated contract, whether or not cost or pricing data was required in connection with the initial pricing of the contract, when the modification involves aggregate increases and/or decreases in cost plus applicable profits expected to exceed $100,000.

The Shipyard has not furnished the Navy the certificate of cost data as specified by ASPR 3-807.3.

The original contract (N00024-70-C-0252) contained a now standard "Price Reduction for Defective Cost of Pricing Data" clause which reads:

> (a) If the Contracting Officer determines that any price, including profit or fee negotiated in connection with this contract was increased by any significant sums because the Contractor . . . furnished incomplete or inaccurate cost or pricing data not current as certified in the Contractor's Certificate of Current Cost or Pricing Data, then such price shall be reduced accordingly and the contract shall be modified in writing to reflect such adjustment.

This provision was included in the contract, as required by 10 U.S.C. § 2306(f), which states:

> Any prime contract or change or modification thereto under which such certificate [Certificate of Current Cost or Pricing Data] is required shall contain a provision that the price to the Government, including profit or fee, shall be adjusted to exclude any significant sums by which it may be determined by the head of the agency that such price was increased because the contractor required to furnish such a certificate, furnished cost or pricing data which, as of date agreed upon between the parties . . . was inaccurate, incomplete, or non-current. . . .

It appears obvious from these quotations that the submission of price and cost data is not a precondition to a finding that the Government is bound by the contract or any subsequent modification thereof. The failure on the part of the Shipyard to ultimately furnish complete and accurate price and cost data does not relieve the Government of its duty to perform under the contract, but rather only

gives it the right to seek a reduction in the price of the contract to the Government.

Nor need we decide whether the United States has waived the statutory and contractual requirements that the Shipyard furnish cost and pricing data. The Government cites *M-R-S Manufacturing Company v. United States,* 495 F.2d 835, 841 (Ct. Claims 1974) for the proposition that a Government agent cannot waive this requirement. However, this decision supports our conclusion, for the only relief granted the Government in that case was a reduction in price.

We note that 10 U.S.C. § 2306(f) provides that no cost and pricing data is required where

> . . . in exceptional cases . . . the head of the agency determines that the requirements of this section may be waived and states in writing his reasons for such determination.

It might be concluded that Deputy Secretary of Defense Clements has taken such action as evidenced by his letter forwarding the compromise agreement to the Department of Justice.

6

Department of Justice Approval

The United States maintains that this is an instance where a private contractor asserts that an agreement has been reached between itself and a federal contracting agency, here the Department of Defense, which settles civil litigation involving a government contract, "*notwithstanding the lack of involvement or approval by the Attorney General,*" and therefore "the purported 'settlement' must fail." Plaintiff's Brief, 37. [Emphasis added.] Such a fact situation is not before this Court.

On August 29, 1975 the Department of Justice stated in open Court to this Court that the Navy's General Counsel would "undertake to ensure the Navy's obligations" to negotiate in good faith a settlement of the dispute over the Shipyard's construction of the DLGN-41. The United States, through its Department of Justice, voluntarily agreed and subjected itself, through the Order of this Court, to negotiate in good faith, thus making a deliberate decision not to seek an immediate judicial determination of its rights under the disputed option contract. *At the request* of the Department of Justice this Court incorporated into its Order of August 29, 1975 the agreement of the United States to negotiate in good faith.

The Department of Justice decided as evidenced by the testimony of its counsel, Jeffrey Axelrad, to rely upon the Navy and not to send any of its officers to directly participate in the DLGN-41 negotiations. This remained the position of the Justice Department despite the Department of Justice's knowledge that the Navy was not in fact negotiating and that Navy officials were in utter default before the appointment of Gordon Rule. On July 13, 1976 the Shipyard filed in this Court a motion to enforce the Court's Order of August 29, 1975. In direct response to the filing of that motion, the Department of Defense appointed Rule as its chief negotiator for the DLGN-41 dispute. The Department of Jusitce was aware of Rule's appointment and the authority conferred on him,[2] and in light of this appointment requested counsel for the Shipyard not to press its July 13th motion. This request was granted.

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[2] During oral argument the Department of Justice stipulated that at the time of Rule's appointment he had the authority to bind the United States; however, the Department of Justice maintains that, subsequent to his appointment, any settlement that he negotiated with the Shipyard became subject to further review and final approval by the Department of Justice.

The Department of Justice agreed to and promoted the Court Order of August 29, 1975 that negotiations "to reach an agreement as rapidly as possible" on behalf of the United States should be conducted by the Navy officials, it reaffirmed this agreement at the time of the appointment of Rule, and it neglected to fulfill its obligations to this Court and the Shipyard to ensure good faith negotiations by the United States, except through its implicit delegation of any authority it had to settle this litigation to the Department of Defense. It therefore is estopped to deny the authority of the Department of Defense officials to approve an agreement which in effects moots or settles this litigation. 15A Am. Jur. 2d, Compromise and Settlement, § 12.

While we hold the Department of Justice, under its action in this case, is estopped to deny the settlement, nevertheless, for appellate purposes we note that in *United States v. Sandstrom,* 22 F.Supp. 190 (N.D. Okla. 1938), where the Attorney General successfully resisted a settlement, that action was based upon the lack of original authority in the Secretary of the Interior to act in the first place. That is not the case here.

We do not decide whether the Department of Justice can block an agreement reached by another executive agency which in effect settles litigation, when the Department has neither participated in nor approved the settlement. Here, we hold, the Department *has* participated. However, we note without comment that the Court of Appeals for the Fourth Circuit has held in *Leonard v. United States Postal Service,* 489 F.2d 814 (1974) that the Department of Justice could not block a compromise agreement reached by the Postal Service which mooted a claim against it for employment discrimination, while the case was pending in the District Court.

We repeat that this is not a case where a federal executive agency has attempted to usurp the authority of the Department of Justice to initiate or control litigation in-

volving the United States. Rather all of the negotiations involving the DLGN-41 between the Shipyard and the Navy were carried out pursuant to an agreement to which the Department of Justice officials gave their express approval, and which, at the express request of the Department of Justice, was incorporated as an order of this Court.

The purpose of the agreement to negotiate in good faith to resolve the differences between the parties with respect to the DLGN-41 was to avoid "vexatious and expensive and, to the contractor oftentimes, ruinous litigation." *Kihlberg v. United States,* 97 U.S. 398, 401 (1878), as quoted in *S & E Contractors, Inc. v. United States,* 406 U.S. 1, 8, 92 S.Ct. 1411, 1416 (1972). Both parties to the agreement ceded their rights "to seek immediate judicial redress for [their] grievances," and have bound themselves to proceed with the construction of the DLGN-41 during the negotiation process. *S & E Contractors, Inc., supra* at 1416. "A citizen has the right to expect fair dealing from his government" with respect to such an agreement. *Id.* at 1417.

There is no contention here that this compromise agreement was arrived at as a result of any fraud or bad faith on the part of the Shipyard. *Id.* at 1419-1420. The Department of Justice has exercised its power to control the United States' position in this litigation—it did so in asking this Court to enter a consent order, as a result of which the United States became bound to negotiate in good faith to resolve the disputes between the parties concerning the DLGN-41. Having exercised this power, it cannot now repudiate its decision. It cannot now maintain that another executive agency has attempted to usurp its control over litigation with the United States.

7

Consideration

The United States contends now that the Rule compromise is "almost totally one-sided in favor of Newport News." It argues that the compromise will cost the Government 22 million dollars. In addition it cites the 22-month deferred delivery date, and the fringe benefits and energy provisions. [It should be noted that under our construction of the compromise agreement the labor escalation clause is the same type as that in the antecedent option contract.] The United States concludes that "the only new consideration coming to the Government under the proposed modification is that it no longer must assume the litigative risk inherent in pursuing its present action for specific performance." (Plaintiff's January 7, 1977 Brief, 4.) This argument must fail for there is ample and sufficient consideration to support a compromise agreement if it is based upon a claim, unliquidated or disputed in good faith, and if the parties make or promise mutual concessions.

A good statement of the legal requirements in the way of consideration for establishing a binding compromise agreement is found in 15A Am. Jur.2d, Compromise and Settlement, § 13, p. 785:

> A compromise, like any other contractual agreement, must be supported by consideration. If there is a liquidated and undisputed claim, and if an effort is made to accomplish an accord and satisfaction through the payment of an amount different from what is undisputably due, there must generally be some new or additional consideration for the accord and satisfaction to be effective. If, however, there is a disputed or unliquidated claim, based upon the parties' doubts and uncertainties, and if the parties, for the purpose of avoiding or putting an end to litigation, agree to resolve their differences amicably and by means of mutual concessions, the promise or execution of such concessions by one party constitutes good consideration for the promise or execution of such concessions by the other party. Thus, a compromise, as distinguished from other types of accord and satisfaction, is supported by good consideration if it is based upon a disputed or unliquidated claim and if the parties make or promise mutual concessions as a means of terminating their dispute; no additional consideration is required.

All of the requisites for consideration to support a binding compromise agreement are found here. The parties dispute in good faith the validity of the antecedent option agreement and the United States' purported exercise on January 31, 1975 for the construction of the DLGN-41; the parties' obligations under this antecedent option agreement were unliquidated. The *basic* price for the construction of the DLGN-41 contained in the compromise agreement is the same as that contained in the antecedent option agreement. And even the antecedent option agreement (Modification P00018) required the parties to negotiate in good faith concerning the inclusion of the DLGN construction contract of a provision for "computing equitable adjustments on account of changes in various laws," *e.g.* Longshoremen and Harbor Workers' Act. The compromise agreement specifies that it constitutes a full and final settlement of all issues which are the subject of dispute in this case, *i.e.* the validity of the Shipyard's obligation to build the DLGN-41.

In addition there is a consideration furnished by the Shipyard's release of "[a]ll claims for delay and delay costs in the delivery schedule of DLGN-41, resulting from, caused by or incident to any and all events, including Government actions or inactions . . . ." We find that the Shipyard has asserted these "delay" claims in good faith, and that the release of these claims is not illusory consideration. There is

some evidence that the Government delayed for more than a year, from mid-1974 until the August 29, 1975 hearing in this Court to inform the Shipyard whether it would incorporate into the specifications for the DLGN-41 all of the changes already made in the DLGN-38, 39 and 40. The Shipyard has alleged that this delay made it impossible to establish an appropriate schedule for the construction of the DLGN-41.

The United States argues that compromise agreements to which the Government is a party require *adequate* consideration. (Plaintiff's January 7, 1977 Brief, 4 n.2.) The United States would have this Court apply a special rule to Government contracts and ignore the hornbook contracts law rule that a Court will not review the adequacy of consideration as long as some valid consideration supports the contract. In the absence of any allegation of fraud or bad faith on the part of the private contractor, we reject that role.

None of the cases cited by the United States support its view that the Court is to review the adequacy of consideration supporting Government contracts. The cases cited by the Government did not address the consideration issue, but rather the issue whether the Government agent had the actual authority to modify a Government contract.

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy.

15A. Am. Jur.2d, Compromise and Settlement, § 5, p. 777, citing *Williams v. First National Bank,* 216 U.S. 582, 30 S.Ct. 441 (1909).

An appropriate Order, in accord with this Memorandum Opinion, will be separately entered this date.

/s/ John A. MacKenzie

United States District Judge

Norfolk, Virginia

March 8, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Newport News Division

(Caption Omitted in Printing)

Order

In accord with a Memorandum Opinion dated and filed March 8, 1977, and to which reference is made,

It is ORDERED:

(1) That the motion of the defendants to enforce the compromise and settlement agreement between the parties is GRANTED.

(2) This action of the plaintiff being therefore moot, the same is DISMISSED.

/s/ JOHN A. MACKENZIE
United States District Judge

Norfolk, Virginia

March 8, 1977

ADDENDUM C

United States Constitution:
Article I, Section 8, Clause 13:

The Congress shall have Power . . . To provide and maintain a Navy;

10 U.S.C. § 131:

The Department of Defense is an executive department of the United States.

10 U.S.C. § 133(a),(b),(d):

(a) There is a Secretary of Defense, who is the head of the Department of Defense, appointed from civilian life by the President, by and with the advice and consent of the Senate. A person may not be appointed as Secretary of Defense within 10 years after relief from active duty as a commissioned officer of a regular component of an armed force.

(b) The Secretary is the principal assistant to the President in all matters relating to the Department of Defense. Subject to the direction of the President and to this title and section 401 of title 50, he has authority, direction, and control over the Department of Defense.

* * *

(d) Unless specifically prohibited by law, the Secretary may, without being relieved of his responsibility, perform any of his functions or duties, or exercise any of his powers through, or with the aid of, such persons in, or organizations of, the Department of Defense as he may designate.

10 U.S.C. § 134:

(a) There are two Deputy Secretaries of Defense, appointed from civilian life by the President, by and

with the advice and consent of the Senate. A person may not be appointed as a Deputy Secretary of Defense within ten years after relief from active duty as a commissioned officer of a regular component of an armed force.

(b) The Deputy Secretaries shall perform such duties and exercise such powers as the Secretary of Defense may prescribe. The Deputy Secretaries, in the order of precedence, designated by the President shall act for, and exercise the powers of, the Secretary when the Secretary is disabled or there is no Secretary of Defense.

(c) The Deputy Secretaries take precedence in the Department of Defense immediately after the Secretary.

10 U.S.C. § 2303(a)(2),(b)(4):

(a) This chapter applies to the purchase, and contract to purchase, by any of the following agencies, for its use or otherwise, of all property named in subsection (b), and all services, for which payment is to be made from appropriated funds:

* * *

(2) The Department of the Navy.

* * *

(b) This chapter does not cover land. It covers all other property including—

* * *

(4) vessels;

10 U.S.C. § 2304(a)(13), (14):

(a) Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising in all cases in which the use of such method

is feasible and practicable under the existing conditions and circumstances. If use of such method is not feasible and practicable, the head of an agency, subject to the requirements for determinations and findings in section 2310, may negotiate such a purchase or contract, if—

* * *

(13) the purchase or contract is for equipment that he determines to be technical equipment whose standardization and the interchangeability of whose parts are necessary in the public interest and whose procurement by negotiation is necessary to assure that standardization and interchangeability;

(14) the purchase or contract is for technical or special property that he determines to require a substantial initial investment or an extended period of preparation for manufacture, and for which he determines that formal advertising would be likely to result in additional cost to the Government by reason of duplication of investment or would result in duplication of necessary preparation which would unduly delay the procurement of the property;

10 U.S.C. § 5011:

The Department of the Navy is separately organized under the Secretary of the Navy. It operates under the authority, direction, and control of the Secretary of Defense. It is composed of the executive part of the Department of the Navy; the Headquarters, United States Marine Corps; the entire operating forces, including naval aviation, of the United States Navy and of the United States Marine Corps, and the reserve components of those operating forces; and all field activities, headquarters, forces, bases, installations, activities, and functions under the control or supervision of the Secretary of the Navy. It includes the United States

Coast Guard when it is operating as a service in the Navy.

10 U.S.C. § 5031:

(a) There is a Secretary of the Navy, who is the head of the Department of the Navy. He shall administer the Department of the Navy under the direction, authority, and control of the Secretary of Defense. The Secretary is responsible to the Secretary of Defense for the operation and efficiency of the Department. After first informing the Secretary of Defense, the Secretary may make such recommendations to Congress relating to the Department of Defense as he may consider appropriate.

(b) The Secretary of the Navy shall execute such orders as he receives from the President relative to—

(1) the procurement of naval stores and material;

(2) the construction, armament, equipment, and employment of naval vessels; and

(3) all matters connected with the Department of the Navy.

(c) The Secretary of the Navy has custody and charge of all books, records, and other property of the Department.

28 U.S.C. § 516:

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

28 U.S.C. § 519:

Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

50 U.S.C. § 401:

In enacting this legislation, it is the intent of Congress to provide a comprehensive program for the future security of the United States; to provide for the establishment of integrated policies and procedures for the departments, agencies, and functions of the Government relating to the national security; to provide a Department of Defense, including the three military Departments of the Army, the Navy (including naval aviation and the United States Marine Corps), and the Air Force under the direction, authority, and control of the Secretary of Defense; to provide that each military department shall be separately organized under its own Secretary and shall function under the direction, authority, and control of the Secretary of Defense; to provide for their unified direction under civilian control of the Secretary of Defense but not to merge these departments or services; to provide for the establishment of unified or specified combatant commands, and a clear and direct line of command to such commands; to eliminate unnecessary duplication in the Department of Defense, and particularly in the field of research and engineering by vesting its overall direction and control in the Secretary of Defense; to provide more effective, efficient, and economical administration in the Department of Defense; to provide for the unified strategic direction of the combatant forces,

for their operation under unified command, and for their integration into an efficient team of land, naval, and air forces but not to establish a single Chief of Staff over the armed forces nor an overall armed forces general staff.

ADDENDUM D

Rule 52(a) Fed. R. Civ. P.:

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

ADDENDUM E

August 29, 1975. Order of the United States District Court for the Eastern District of Virginia.

WHEREAS, the Government has given written notice of exercise of Option 1, Alternative 2, for the construction of DLGN-41, under Article 28 of Contract N00024-70-C-0252; and

WHEREAS, the contractor, Newport News Shipbuilding and Dry Dock Company, has given written notice to the Government that the Contractor regards the option to be invalid and its purported exercise ineffectual;

NOW THEREFORE, in consideration of these premises:

1. The Contractor will immediately resume the procurement of material and the performance of shop fabrication and other preliminary work for the DLGN-41 and proceed to undertake construction. Payment for such work will be made by the Navy on the same basis as payments were made prior to June 6, 1975. The Contractor's and the Navy's obligations under this paragraph shall be without prejudice to their legal position and contractual rights, including recoupment of any overpayment.

It is understood by the parties that all of the changes made in the plans and specifications for DLGN-38, DLGN-39, and DLGN-40 that are applicable will be incorporated in the plans and specifications for DLGN-41, and the parties agree to negotiate in good faith the appropriate equitable adjustments for all such changes.

2. The parties agree to negotiate in good faith to reach an agreement as rapidly as possible to modify those contract provisions requiring amendment or to take other appropriate action.

3. Both parties agree to urge the Comptroller General to expedite his opinion on the issues heretofore

submitted by the Contractor, and to promptly furnish a copy of the Comptroller General's opinion to the United States District Court for the Eastern District of Virginia. Either party may assert whatever rights it may have in respect of such opinion to the Court, and the Court shall retain jurisdiction in the interim.

4. The United States having represented that sufficient funds are available to make payments to the Contractor under paragraph 1 hereof for a period of at least one year, the stipulation shall remain in effect for a period of one year from the date hereof, unless cancelled or modified by mutual agreement or by Order of the United States District Court for the Eastern District of Virginia at the request of either party.

5. This stipulation and any action taken by either party pursuant hereto shall be without prejudice to the rights or legal positions of either party.

No. 77-1696

In the Supreme Court of the United States

OCTOBER TERM, 1978

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, and TENNECO, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 571 F. 2d 1283. The opinion of the district court (Pet. App. 13a-45a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1978. The petition for a writ of

certiorari was filed on May 26, 1978. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the parties entered into a binding contract.

2. Whether the court of appeals applied the correct standard in reviewing the district court's judgment.

STATEMENT

In 1971 petitioner Newport News contracted with the Navy to build three ships. The contract contained a provision giving the Navy an option for a fourth ship, exercisable before a certain date.[1] The parties extended the option date to February 1, 1975, provided certain conditions were satisfied, including the parties' undertaking to negotiate certain matters in good faith. In August 1974 Newport News notified the Navy that it regarded the option to be void because, it asserted, the Navy had failed to negotiate in good faith. On January 31, 1975, the Navy formally undertook to exercise the option, notwithstanding Newport News' claim that it was void.

The United States brought this suit in August 1975, seeking specific performance of the contract and an order directing Newport News to resume work. Before the district court ruled on the government's

[1] The history of this controversy is set forth more fully in the opinions of the district court (Pet. App. 16a-27a) and the court of appeals (Pet. App. 1a-5a).

request for preliminary relief, the parties concluded a new agreement. This agreement, which was entered as an order of the court, was a covenant "to negotiate in good faith to reach an agreement as rapidly as possible to modify those contract provisions requiring amendment or to take other appropriate action" (Pet. App. 22a). On July 13, 1976, after some further unsuccessful negotiating efforts, the Navy appointed Gordon Rule as its negotiator and on August 19, 1976, issued Rule a warrant granting him "unlimited authority with respect to negotiations" (*id.* at 3a). But although Rule had plenary authority to negotiate, he was informed several times during the negotiations that he did not have contracting authority, and that any agreement he might negotiate would require the review and approval of higher officials (*id.* at 4a).

On August 20, 1976, Rule negotiated an oral agreement, which would result in an increased cost to the Navy of approximately $22.7 million (Pet. App. 3a, 11a). On August 30, and again on September 27, 1976, Newport News prepared and submitted to Rule written drafts purporting to memoralize the oral agreement. Rule did not sign those drafts because they contained unacceptable price increase provisions. Newport News executed a third draft on October 7, 1976, and sent it to Rule. Rule signed the draft on that day but set two significant conditions in his cover letter returning the draft to petitioner (*id.* at 3a):

> (i) That ultimate approval must be received from Deputy Secretary of Defense Clements, and

(ii) That escalation under this Mod [i.e., modification of the contract] will be paid by the Government on the basis of the contractor's actual experience or the BLS Indices times 1.25, whichever is less.

On October 15, 1976, Deputy Secretary Clements sent a copy of the proposed compromise to the Attorney General "for your approval and such legal action as may be necessary to obtain ratification" (Pet. App. 12a). Although Clements recommended approval, the Attorney General disapproved the proposed agreement on November 24, 1976 (*id.* at 4a).

Newport News then asked the district court to enter judgment in its favor or to dismiss the complaint on the ground that the parties had entered into a binding contract settling all the issues in the case. The district court held, on the basis of the documentary evidence and without an evidentiary hearing, that the August 20, 1976, oral agreement was a binding contract. It stated that Rule had authority contractually to bind the government and that the agreement was adequately memoralized in written documents (Pet. App. 31a-38a). The court held that the government was estopped from relying on the disapproval of the Attorney General because the government had stated to the court that the parties would negotiate in good faith, and the Justice Department had delegated those negotiations to the Navy (Pet. App. 38a-41a). As an alternative ground for dismissing the government's suit for specific performance, the district court held that the government

had not negotiated in good faith and was therefore not entitled to an equitable remedy (Pet. App. 27a-29a).

The court of appeals reversed. It held that the August 20, 1976, agreement was not a binding contract because the "uncontradicted facts disclos[e] that the parties did not intend to commit themselves irrevocably to an oral settlement of the case on August 20" (Pet. App. 6a). The court relied for that conclusion on (a) the fact that two drafts submitted to Rule after August 20 were not accepted by him because they contained substantive provisions about which the parties disagreed (and continued to disagree later in the district court); (b) the fact that Rule conditioned his signing Newport News' third draft on the approval of Deputy Secretary Clements; (c) the fact that Clements himself submitted the proposal to the Attorney General for approval; and (d) the fact that 28 U.S.C. 516 and 519 authorize the Attorney General to supervise all litigation involving agencies of the government unless otherwise specified by law (Pet. App. 6a-9a). The court also held that the evidence did not establish bad faith on the part of the government sufficient to preclude its claim for equitable relief under the unclean hands doctrine, and that summary disposition of the case on that basis was inappropriate (Pet. App. 9a-10a). It therefore remanded for further proceedings on that issue and other outstanding issues in the case (Pet. App. 10a).

ARGUMENT

The decision of the court of appeals is correct. It turns on the particular facts relating to the parties' understanding and intent with respect to their negotiations, and it presents no issue of general importance requiring review by this Court.

Petitioners assert (Pet. 2, 15-20) that this case presents the question whether the Attorney General has the authority to set aside a binding contract executed by the Navy, when that contract would moot pending litigation. The case, however, presents no such question. The threshold question here is whether Newport News and the Navy entered into a binding contract, and that question turns on their intent and understanding. The record amply supports the court of appeals' conclusion that the Navy never intended the drafts prepared by Newport News to be binding.

Newport News, after August 20, submitted three drafts to Rule purporting to reflect their oral agreement. Rule did not sign the first two drafts, because they contained substantive provisions about which there remained disagreement. He signed the third draft but expressly conditioned his signature on (1) acceptance by Newport News of the government's position on the cost increase clause, and (2) ultimate approval by the Deputy Secretary of Defense, Mr. Clements.[2] Clements in turn submitted the draft to the Attorney General and never gave his personal approval. The undisputed facts therefore establish that the parties' actions in this case did not create a contract.

That conclusion is further supported by 28 U.S.C. 516 and 519, which authorize the Attorney General to direct and supervise all litigation involving agencies such as the Navy, and which have long been held to include his authority over the settlement of pending litigation. *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458; *New York* v. *New Jersey*, 256 U.S. 296, 308. The Attorney General's well recognized statutory role in the settlement of litigation justifies the presumption that, as a factual matter, the parties did not intend to bind themselves without obtaining his approval.[3]

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[2] The court of appeals stated (Pet. App. 6a) that Rule's inclusion of conditions to his acceptances precluded the creation of a binding contract "until the condition has been withdrawn or satisfied," citing *Orient Mid-East Great Lakes Service* v. *International Export Lines, Ltd.*, 315 F. 2d 519, 522 (C.A. 4). In our view the law on this point is even less favorable to petitioners. When B accepts A's offer to B on condition that A accept certain material changes (here the escalation provision), B has given a counteroffer, which extinguishes A's offer unless the facts indicate a contrary intent. B cannot create a contract by removing or satisfying his condition. The contract is created only when A accepts the counteroffer. *Williston on Contracts* § 77 (Jaeger ed.). There is no evidence of Newport News' acceptance of Rule's escalation provision; as the court of appeals noted, Newport News continued to press for its version of the cost escalation provision in the district court hearing on its motion to enforce the contract (Pet. App. 6a). This point does not affect the result here, however. The facts still support the court of appeals' conclusion that the parties never committed themselves to the August 20 oral agreement.

[3] Because the facts establish that the parties did not intend to bind themselves to a contract, it is immaterial whether Rule had the legal authority to enter into a binding contract

Petitioners also argue (Pet. 21-28) that the court of appeals failed properly to apply the "clearly erroneous" standard of review of Fed. R. Civ. P. 52(a) in reversing the district court's judgment. Rule 52(a), however, does not apply. Rule 52(a) provides that "[i]n all actions tried upon the facts * * * the court shall find the facts specially * * *", and further provides in relevant part that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 and 56 or any other motions * * *." In this case petitioner moved for "Entry of Judgment or, In the Alternative, for Dismissal with Prejudice" (Pet. 11); this, although not expressly so termed, was clearly a motion for summary judgment under Rule 56. Thus, the district court held no evidentiary hearing and ruled entirely on the documentary record. The district court was not entitled to "find" facts without a trial; as in all summary judgment proceedings, the facts must be taken in the light most favorable to the person opposing the motion.

or whether, if he had done so, the Attorney General would have had the legal authority to set it aside. Therefore, petitioners err in claiming that this case presents the latter issue. In our view, however, the Attorney General has that authority in the circumstances of this case, and the cases cited by petitioner (Pet. 18-20) are not to the contrary. *S & E Contractors, Inc.* v. *United States*, 406 U.S. 1, did not involve pending litigation in which the Department of Justice was representing an agency; it involved, instead, an effort by the Department of Justice to obtain judicial review of an agency decision. The holding in *Leonard* v. *United States Postal Service*, 489 F. 2d 814 (C.A. 1), was based on the special statutory language of the Postal Service statute, and the language relied on by petitioners is *dictum*.

Moreover, the court of appeals' decision was based on the uncontradicted facts. There is therefore no basis for petitioner's claim that the court applied an incorrect standard of review. See, *e.g.*, *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1978.

[4] Even if the "clearly erroneous" standard had been applicable, the uncontradicted facts outlined above rendered the district court's conclusion that the parties had executed a binding agreement clearly erroneous.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 270226 83

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1696

Newport News Shipbuilding and Dry Dock Company and Tenneco Inc., *Petitioners*

v.

United States of America, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Pursuant to Rule 24 of the Rules of this Court, petitioners submit this Reply to the Brief for the United States in Opposition.

UNITED STATES' FACTUAL PRESENTATION

The Brief for the United States in Opposition makes unsubstantiated [1] assertions which are inaccurate, in-

[1] The Brief for the United States contains no record references. Petitioners documented all statements in their Petition by references to the record below. Although counsel for both the United States and the petitioners asked that the record below be transmitted to this Court in connection with this Petition for Writ of

complete, and misleading, thus obscuring the issues presented to this Court for review.

The United States asserts (U.S. Br. 2): "In August 1974 Newport News notified the Navy that it regarded the option to be void because, it asserted, the Navy had failed to negotiate in good faith." In fact, when Newport News gave this notification, the Navy's failure to negotiate in good faith as required by the terms of Contract Modification P00018 was only *one* of many reasons advanced at that time for invalidity of the option. The affidavit of F. Hunter Creech filed in the District Court on August 29, 1975, briefly explains, at pages 3-9, the events leading to Newport News' August 1974 notification to Navy that the option was void. The impression left by the United States in its Brief is that the only issue that has separated the parties since 1974 on the question of option validity is the failure of good faith negotiations, when in fact other substantive legal questions as to the validity of the option have always been present and have been known by the Navy. The significance of this background to this case is that the District Court had reason to believe, and did believe, as early as August 29, 1975, that the commitment the parties made to the court on that date to "negotiate in good faith" embraced *all issues* dividing the parties, including, but not limited to, the validity of the option and its exercise. This commitment of the parties, and the District Court's understanding thereof, is material to this case since it provided (1) the framework for the actions of both parties throughout this case including the action that led to the agreement between Gordon Rule and Newport News, and (2) the basis of the District Court's finding that the United States had acted less than fairly and candidly toward Newport News and the District Court.

Certiorari, the clerks of the Court of Appeals and this Court advised that such transmittal was unnecessary. In view of the questions now presented concerning the completeness of the information before this Court, petitioners suggest that it might be appropriate for this Court to call up the record for use in its consideration of the Petition.

Also, the assertion in the Brief of the United States (U.S. Br. 3) that Gordon Rule "was informed several times during the negotiations that he did not have contracting authority" is misleading. On August 20, Mr. Rule possessed a formal, duly issued, contracting officer's warrant, a fact conceded by the United States. It was only after the agreement between the parties was reached on August 20, that certain statements were made by Mr. Rule's superiors to Mr. Rule and to Newport News' representatives alleging that review and approval of Mr. Rule's agreement with Newport News Shipbuilding were necessary to finalize it. In addressing the issue of Mr. Rule's authority it is not enough to state that Mr. Rule was informed that he lacked contracting authority. The central issue, ignored by the Court of Appeals and the Brief for the United States in Opposition, is the legal efficacy of these attempts to limit Mr. Rule's authority, which attempts were made *after* Mr. Rule's appointment and *after* he had reached agreement with Newport News.[2]

[2] At no time prior to August 20 was Newport News told of any limitations on Rule's authority. [App. 239-41] Moreover, Mr. Rule testified that he was not told of any limitation on his authority prior to the agreement of August 20. [App. 306, 374] Furthermore, Mr. Rule's contracting officer's warrant (on DD Form 1539) issued on August 19, 1976, appointed him a "Contracting Officer"

In addition, the statement in the Brief for the United States (U.S. Br. 6) that Mr. Rule did not sign certain draft modifications submitted to him by Newport News "because they contained substantive provisions about which there remained disagreement" is again misleading. It creates the impression that bargaining was continuing after August 20 and that the minds of the parties had not met on that date. In fact, it is undisputed by Mr. Rule and Mr. Dart (the parties' representatives) that the written drafts were prepared to confirm the agreement that had already been reached and to quantify what the parties had done. [App. 235, 307.]

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and granted him "Unlimited authority with respect to negotiations with Newport News Shipbuilding and Dry Dock Company for construction of CGN 41 under Contract N00024-70-C-0252." [App. Ex. 276; App. 230, 301, 306-07, 361, 374-75].

The Armed Services Procurement Regulation (ASPR), § 1-201.3, 32 C.F.R., Parts 1-39 (1976), defines a "Contracting Officer" as follows: "*Contracting Officer* means any person who, either by virtue of his position or by appointment in accordance with procedures prescribed by this Regulation, is currently a contracting officer (See 1-400) *with the authority to enter into and administer contracts* and make determinations and findings with respect thereto, or with any part of such authority." (emphasis added)

ASPR, § 1-405.2, 32 C.F.R., Parts 1-39 (1976), provides that contracting officers are to be appointed by DD Form 1539 and that any limitations on the scope of authority to be exercised by the contracting officer, other than those contained in ASPR, shall be entered on the face of the certificate of appointment. It is clear that no limitations were entered on the face of Mr. Rule's warrant. [App. Ex. 276] Moreover, ASPR § 1-405.4, 32 C.F.R., Parts 1-39 (1976), provides that, "to accomplish a modification of the contracting officer's authority, his present appointment shall be revoked, and a new certificate issued." It is undisputed that Mr. Rule's warrant was not revoked until October 8, 1976, after he reached agreement with Newport News on August 20 and after he executed the formal contract confirming that agreement. [App. 333, 334, 572-73; App. Ex. 279]

That the parties discussed the terms of their agreement after August 20 does not mean that bargaining was continuing; the parties were merely seeking the correct words to record their previously concluded agreement. *See, Saul Bass & Associates* v. *United States,* 505 F.2d 1386 (Ct. Cl. 1974).

AUTHORITY OF THE ATTORNEY GENERAL

Equally significant is the Government's cavalier dismissal (U.S. Br. 6) of the issue presented to this Court concerning the lack of authority in the Attorney General to set aside a contractual action of an agency of the United States simply because that action has the effect of mooting pending litigation in which the Attorney General has appeared as counsel. In spite of the United States' attempt to brush this issue aside, it is clear that the Court of Appeals itself not only addressed the issue, but also considered it in part dispositive: "We vacate this order because we conclude that the parties' negotiators did not settle the case orally *and because the Attorney General, whose approval was essential, rejected the terms that were ultimately reduced to writing.*" (Pet. Add. 2a, emphasis added.) Moreover, the Court of Appeals devoted an entire section of its opinion to its view of the Attorney General's authority. (Pet. Add. 7a-9a).

STANDARD OF REVIEW

Finally, there is no support for the virtually frivolous contention advanced by the United States (U.S. Br. 8-9) that the clearly erroneous standard of review of Rule 52(a) Fed. R. Civ. P. does not apply. The United States argues that petitioners' motion in the District Court, "although not expressly so termed, was

clearly a motion for summary judgment under Rule 56." Petitioners' motion was, however, not a motion for sumary judgment; it was instead based (i) on the District Court's inherent power to enter judgment, under Rule 58, Fed. R. Civ. P., enforcing a settlement agreement and (ii) on the District Court's power as set forth in Rule 41(b), Fed. R. Civ. P., to dismiss the case for the failure of the United States to comply with an order of court.

As the record in this case demonstrates, the United States contended in its brief to the Court of Appeals that petitioners' motion was one for summary judgment and that the District Court committed an error by resolving factual inferences in favor of petitioners and against the United States. In the alternative, the United States asked the Court of Appeals to find that the District Court had comitted error in its failure to hold an evidentiary hearing on petitioners' motion. It is significant that the United States neither (i) asked the District Court to hold an evidentiary hearing in order to resolve factual disputes, nor (ii) suggested to the District Court that it was precluded on the state of the record from resolving any conflicting evidence as to whether there was a binding compromise agreement between the parties and whether the United States had failed to negotiate in good faith. To the contrary, in the District Court, the United States filed, and relied on, numerous affidavits and the transcript of the deposition of Gordon W. Rule in support of its positions that no settlement agreement had been concluded and that the United States had not failed to negotiate in good faith.

The Court of Appeals held that no error had been committed by the failure of the District Court to hold

an evidentiary hearing, recognizing the well settled principle that a court has inherent power to enforce summarily a compromise terminating pending litigation. While some courts have held that, in the case of a dispute about the existence of a settlement agreement in which complex factual issues are presented, an evidentiary hearing should be held, *Autera* v. *Robinson,* 419 F.2d 1197 (D.C. Cir. 1969), it is beyond dispute that, either after a summary proceeding or after an evidentiary hearing, the district court must, or at the very least *may,* make findings in order to rule on a motion to enforce a settlement. There is thus no basis whatever for, and no case can be found to support, the proposition advanced by the United States that a motion to enforce a settlement is akin to a motion for summary judgment where all facts must be viewed most favorably to the party opposing such motion. Since a district court can make findings on a motion to enforce a settlement agreement, and in this case did make findings, the clearly erroneous standard of Rule 52(a), Fed. R. Civ. P. must apply to any review of those findings.[3]

The alternative basis of petitioners' motion in the District Court, and the alternative basis of that court's decision in this case, was that the complaint of the United States should be dismissed on account of the failure of the United States to comply with orders of court directing good faith negotiations between the parties. In such a case, the District Court has inherent power to impose sanctions, including dismissal, for the failure of a plaintiff to comply with an order of

[3] A more complete discussion of the relevant facts and applicable law may be found in the Petition for Writ of Certiorari, 21-28, and in petitioners' Brief to the Court of Appeals, 7-10.

court. *Reid* v. *Prentice-Hall, Inc.,* 261 F.2d 700, 701 (6th Cir. 1958). Where the decision of the court to impose such a sanction is based on its findings of certain facts, those findings should not be overturned unless shown to be clearly erroneous. *Id.* No such showing has been made in this case, and the Court of Appeals reached its erroneous conclusions only by acting in contravention of the standard of review required by Rule 52(a), Fed. R. Civ. P.

CONCLUSION

For all of the reasons set forth in the Petition and in this Reply Brief, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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